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THE

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Indian Appeals:

BEING

CASES

IN

THE PRIVY COUNCIL

ON APPEAL FROM

THE EAST INDIES.

REPORTED BY HERBERT COWELL, ESQ.,
OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

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OF THE

JUDICIAL COMMITTEE

OF

HER MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL,

ESTABLISHED BY THE 3RD & 4TH WILL. IV., C. 41,

FOR HEARING AND REPORTING ON APPEALS TO HER MAJESTY IN COUNCIL.

1894.

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The Duke of *Richmond and Gordon*.
The Marquis of *Ripon*.
Earl of *Selborne*.
Earl *Spencer*.
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BENGAL SECRETARIAT LIBRARY

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

PAGE

Abdool Razack *v* Aga Mahomed Jaffer Bindaneem . . 56
Abdul Wahid Khan *v.* Shaluka Bibi 26

Bala Gouri Vallabha Tevar *v.* Zemindar of Shivaganga . 93
Bombay Burmah Trading Corporation *v.* Smith . . 139

Cherukunneth Manakel Neelakandhen Namkoodiripad *v.* Vengunat Swaroopathil P. R. Varma Valia Nambidi . . 128
Chutraput Singh Doorga *v.* Dwarkanath Ghose . . . 170

Deo Kuar *v.* Man Kuar . . 148

Goswami Shri *v.* Shri Goverdhanlalji Girdhariji Maharaj . . 13
Greender Chunder Ghose *v.* Troylockhonauth Ghose . . 35

PAGE

Gunga Pershad Sahu *v.* Land Mortgage Bank of India . 1

Imambandi Begum *v.* Kamleswari Pershad . . . 118

Kader Moideen *v.* Nepean . . 96
Kishore Bun Mohunt *v.* Dwarkanath Adhikari. Kishore Bun Mohunt *v.* Prosunno Coomar Adhikari 89

Lukhi Narain Jagadeb *v.* Maharajah Jodu Nath Deo . . 39

Mahant Gajraj Puri *v.* Achaibar Puri 17
Makund Ram Sukal *v.* Saliq Ram Sukal 47

Ponnambala Tambiran *v.* Sivagnana Desika Gnana Sambhanda Pannara Sannadhi . . 71

PAGE

Prit Koer *v.* Mahadeo Pershad Singh 134

Rani Hemanta Kumari Debi *v.* Maharajah Jagadindra Nath Roy Bahadur. Hem Chunder Chowdhry *v.* Maharajah Jagadindra Nath Roy Bahadur . 131

PAGE

Sirdar Gurdyal Singh *v.* Rajah of Faridkote 171

Tewari Jaswant Singh *v.* Lala Sheo Narain Lal . . . 6

Umrao Begam *v.* Irshad Husain 163

BENGAL SECRETARIAT LIBRARY

BY ORDER OF THE LIEUTENANT GOVERNOR OF BENGAL * FORWARDED

TABLE OF CASES CITED.

A.

		PAGE
Abdul Wahid Khan *v.* Mussamat Nuran Bibi	Law Rep. 12 Ind. Ap. 91	29
Abouloff *v.* Oppenheimer & Co.	10 Q. B. D. 295	181
Asgur Mahomed *v.* Nuzeema Bibi	14 Suth. W. R. 272	29
Ashbury *v.* Ellis	[189] A. C. 341	181
Ashrufood Dowlah Ahmed Hossein Khan *v.* Hyder Hossein Khan	11 Moore's Ind. Ap. 113	56, 61, 62, 69

B.

Bank of Australasia *v.* Nias	16 Q. B. 717	181
Becquet *v.* Macarthy	2 B. & Ad. 951	172, 183, 186
Bhavanishankar Shevakram *v.* Pursadri Kalidas	Ind. Law Rep. 6 Bomb. 292	176

C.

Charkieh, The	Law Rep. 4 A. & E. 59	181
Clun's Case	Tudor's L. C. 3rd Ed. p. 332	121
Dakshina Mohun Roy Chowdhry *v.* Saroda Mohun Roy Chowdhry	Law Rep. 20 Ind. Ap. 160	30

D.

Dix *v.* Burford	19 Beav. 409.	142
Don *v.* Lippman	5 Cl. & F. 1	183, 186
Duchess of Kingston's Case	2 Sm. L. C. 871	181
Durham (Earl of) *v.* Legard	34 Beav. 611.	120

F.

Ferguson *v.* Mahon	11 Ad. & E. 179	181

G.

Godard *v.* Gray	Law Rep. 6 Q. B. 139	181, 183
Gopanund Jha *v.* Lalla Gobind Pershad	12 Suth. W. R. 109	122

H.

Hewitson *v.* Fabre	21 Q. B. D. 6	183
Hill *v.* Buckley	17 Ves. 394	122
Hooper *v.* Smart	Law Rep. 18 Eq. 683	122

I.

		PAGE
Imambandi Begum *v.* Kamleswari Pershad.	Law Rep. 13 Ind. Ap.	119, 121

K.

Kaliyugam Chetti Chokalinga Pillai .	Ind. L. R. 7 Madras, 105 .	183
Khajah Hidayat Oollah *v.* Rai Jan Khanum *v* . . .	8 Moore's Ind. Ap. Ca. 295	61, 62

M.

Maharaval Mohansingji Jeysingji *v.* Government of Bombay . .	Law Rep. 8 Ind. Ap. 77 .	161
Mahomed Bauker Hoossain Khan *v.* Shurfoonnissa Begum . .	8 Moore's Ind. Ap. Ca. 136	61, 62
Mathappa Chetti *v.* Chellappa Chetti .	Ind. L. R. 1 Madras, 199	181, 182
Maw *v.* Topham . . .	19 Beav. 576 . .	120
Muhammad Allahdad Khan *v.* Muhammad Ismail Khan . . .	Ind. L. R. 10 Allah. 289	58, 61, 62
Mussamat Bibi Najib-un-nissa, In re .	4 Beng. L. R. A. C. 55	61, 63
Mussummat Durga Chowdhrain *v.* Jawahir Singh	Law Rep. 17 Ind. Ap. 122	41, 45

N.

Nawab Muhammad Azmut Ali Khan *v.* Mussumat Lalli Begum . .	Law Rep. 9 Ind. Ap. 18	61, 63
Neelkristo Deb Burmono *v.* Beerchunder Thakoor	12 Moore's Ind. Ap. Ca. 523 .	74

P.

Pertab Narain Singh *v.* Subhao Koer .	Law Rep. 4 Ind. Ap. 228	163, 164, 167
Peruvian Guano Company, Limited *v.* Dreyfus Brothers & Co. . .	[1892] A. C. 166 . .	30
Price *v.* Dewhurst . . .	8 Sim. 279 . . .	181

R.

Ragava *v.* Rajaratuam . . .	Ind. L. R. 14 Madras 57 .	74
Raja Gobind Lal Roy *v.* Rajanam Misser	Law Rep. 20 Ind. Ap. 165 .	2
Ramgopal *v.* Shamskhaton . .	Law Rep. 19 Ind. Ap. 228 .	41
Ramratan Sukal *v.* Mussamat Nandu .	Law Rep. 19 Ind. Ap. 1	41, 45
Randall *v.* Randall . . .	7 East, 81 . . .	48
Ranee Khujooroonnissa *v.* Mussamat Roushun Jehan . . .	Law Rep. 3 Ind. Ap. 291	61, 62
Ranee Surnomoyee *v.* Lutchmeeput .	9 Suth. W. R. 339 . .	41
Rani Janki Kuar *v.* Raja Ajit Singh .	Law Rep. 14 Ind. Ap. 148 .	30
Rolls *v.* Miller	27 Ch. D. 71 . . .	14
Rousillon *v* Rousillon . . .	14 Ch. D. 351 .	181, 183, 187

S.

		PAGE
Saiyad Wali Ulla *v.* Miran Saheb .	2 Bomb. H. C. R. 285 .	63
Sama Rayar *v.* Annamalai Chetti .	Ind. L. R. 7 Madras 164 .	183
Schibsby *v.* Westenholz . .	Law Rep. 6 Q. B. 161	172, 175, 178, 181, 183, 186, 187
Smith *v.* Anderson . . .	15 Ch. D. 247 . .	14
Stone *v.* Phillips . . .	4 Bing. N. C. 37 . .	48
Syed Sadakut Hossein *v.* Syed Mahomed Yusoof	Law Rep. 11 Ind. Ap. 31	61, 63

U.

Umes Chunder Sircar *v.* Zahoor Fatima.	Law Rep. 17 Ind. Ap. 201 .	2

V.

Vadala *v.* Lawes . . .	25 Q. B. D. 310 . .	181
Vasudev Sadashiv Modak *v.* Collector of Ratnagiri	Law Rep. 4 Ind. Ap. 119 .	161

W.

Wakefield *v.* Llanelly Railway and Dock Company	11 Jur. (N.S.) 456 . .	48
Williams *v.* Jones . . .	9 M. & W. 819 . .	183

ORDER OF THE LIEUTENANT GOVERNOR OF BENGAL FORWARDED BY BENGAL SECRETARIAT LIBRARY.

CASES

IN

THE PRIVY COUNCIL

ON APPEAL FROM

The East Indies.

GUNGA PERSHAD SAHU . . . . . PLAINTIFF;

AND

THE LAND MORTGAGE BANK OF INDIA, LIMITED . . . . . DEFENDANT.

J. C.*
1893
Nov. 8.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Vendor and Purchaser—Construction—Assignment of Mortgage as per Conditions set forth in the Bond—Compound Interest.

Where a second mortgagee claimed to redeem against the assignee of a first mortgage, who had bought under a decree against the mortgagors for principal and interest "as per conditions set forth in the bond":—

Held, that the assignee was entitled to compound interest, such being one of the conditions of the bond, and could not be limited to simple interest unless it clearly appeared that the decree intended to alter the terms of the bond.

APPEAL from a decree of the High Court (Sept. 15, 1890) modifying a decree of the Subordinate Judge of *Bhagulpore* (Sept. 29, 1888).

The facts are stated in the judgment of their Lordships.

The main questions in the suit were whether the Appellant, by his father's purchase in execution, obtained an absolute estate free from the Respondents' right of redemption as puisne mortgagees, and secondly, assuming that right of redemption to

* *Present*:—LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, and SIR RICHARD COUCH.

J. C.
1893
GUNGA PERSHAD SAHU v. LAND MORTGAGE BANK OF INDIA.

exist, on what terms as to interest such redemption should be allowed.

The Courts below concurred in holding that the Respondents had a right to redeem, but differed as to whether such redemption should be conditional on the payment of compound interest after the date of the decree obtained by the Appellant's father.

The First Court allowed compound interest up to the date of satisfaction of the Appellant's mortgage debt.

The High Court disallowed compound interest from the date of the decree, and from that date allowed only simple interest at 12 per cent. per annum.

Mayne, and *C. W. Arathoon*, for the Appellant.

Sir *John Rigby*, S.G., and *Doyne*, for the Respondent.

The cases cited were *Umes Chunder Sircar* v. *Zahoor Fatima* (1); *Raja Gobind Lal Roy* v. *Rajanam Misser* (2).

The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

The Plaintiff in this suit is the first mortgagee, in right of his father, *Bunwari Lal Sahu*, of certain property, and the Defendants, the *Land Mortgage Bank of India*, are the second mortgagees. On the 19th of March, 1877, *Bunwari Lal Sahu* obtained a decree for the realization of his mortgage against the mortgagors of the property, but the Defendants were no parties to that suit. Some time afterwards a sale took place in pursuance of the decree, and *Bunwari Lal Sahu* became the purchaser. Subsequently disputes arose between the Defendants and the Plaintiff, the Defendants disputing the title of the Plaintiff. The Plaintiff thereupon brought the present suit in the Court of the Subordinate Judge of *Bhagulpore* to enforce his title as absolute owner. The Defendants disputed the Plaintiff's title *in toto*, and claimed to be the first incumbrancers upon the property, and in the alternative they claimed to be second mortgagees and to be entitled to redeem the mortgage. All the issues raised by the Defendants claiming to be absolute owners

(1) Law Rep. 17 Ind. Ap. 201. (2) Law Rep. 20 Ind. Ap. 165.

were decided against them, but the alternative case that they made was decided in their favour, and it was held that the Plaintiff could only stand as mortgagee of the property, and that the Defendants were entitled to redeem. The question then arose as to the terms of the redemption, and the principal point raised on that part of the case, which has been the only point argued before their Lordships, was whether or no the Plaintiff's mortgage debt should bear compound interest.

By the mortgage bond the mortgagors contracted to pay interest at 12 per cent., and that if they did not pay it they would, "after the expiration of 24th Assin, pay interest on the entire amount of interest not paid (treating it as principal) at 1 per cent. per mensem, regularly every year all along till the repayment in full of the amount covered by this bond without any objection whatever." It is alleged by the Defendants that the terms of the bond were altered by the decree of the 19th of March, 1877, and that thenceforth simple interest only was to be paid. The Subordinate Judge decided that there was no reason why compound interest should not be allowed according to the terms of the bond. He says there is a stipulation for it in the bond, and he is unable to see why effect should not be given to that stipulation. It does not appear from the judgment of the Subordinate Judge what was the objection then made by the bank to the payment of compound interest.

On the appeal to the High Court this point was raised amongst others, and on it the judgment of the High Court was in favour of the bank. The reason given by the Judges of the High Court for so deciding is this. They say that the terms of the decree of the 19th of March, 1877, do not give compound interest: that the decree was one made by consent, and upon the petition of the mortgagors, admitting the claim of the Plaintiff. The petition runs thus:—"It is prayed that the claim may be decreed with costs and interest for the period of pendency of suit, as well as interest from the date of decree to the day of realization on the entire amount of decree, principal and interest at 1 per cent. per mensem, as per conditions set forth in the bond, the basis of the claim and costs, against the property mortgaged in the bond." The order made thereon was in the following terms:—"That the

J. C.
1893
GUNGA PERSHAD SAHU v. LAND MORTGAGE BANK OF INDIA.

case be decreed in accordance with the petition of admission of claim."

The High Court then set forth the contentions of the parties as follows:—"It is contended on the one hand that the terms 'as per conditions in the bond' referred only to the rate of interest, '1 per cent. per mensem,' and not to the rests which were specified in the bond, so as to make the interest compound interest; while for the Plaintiffs it is claimed that the agreement embodied in the decree was to continue the conditions of the bond in every respect." The High Court then go on to say:—"We have, however, some indication of the manner in which the Court itself regarded this, for in the account of interest during the pendency of the suit, the calculation has been made, not on the consolidated amount of principal and interest forming the entire claim, but on the principal only; and this, we may observe, has been accepted by the parties concerned. We find, therefore, that the decree of the 19th of March, 1877, gave simple interest thenceforth only at 12 per cent. on the amount claimed in the plaint of that suit"; and they varied the decree of the Subordinate Judge in that respect.

It seems to their Lordships that the High Court had no sufficient warrant for putting that construction upon the decree of the 19th of March, 1877. The terms in the body of the decree are such as to introduce all the conditions of the mortgage. The claim is to be decreed with costs and interest for the period of the pendency of the suit, as well as interest from the date of the decree to the day of realization on the entire amount of the decree, principal and interest, at 1 per cent. per mensem, "as per conditions set forth in the bond." Now the condition of treating interest as principal, so as to carry interest if it were not paid by a date mentioned in the bond, is just as much one of the conditions of the bond as any other condition therein, and therefore their Lordships can see nothing in that language which indicates an intention of altering the contract made by the bond.

But the point relied upon by the bank is this: the Plaintiff in the suit of 1877 sued for Rs.32,000, the principal secured by the bond, and for a sum of Rs.15,961 15*a.* 3*p.* interest accrued

up to the day this plaint was filed, which, it is found by calculation, is compound interest. There is also another item set forth in the decree, namely, interest during the period of the pendency of the case from the 17th of January, 1877, which was the date of the filing of the plaint, until the 18th of March, 1877, which was the day before the date of the decree, and that interest was to be "on the principal amount at 1 per cent. per mensem for two months one day," that is to say, on the Rs.32,000. That amount is stated in the decree to be Rs.650 10*a*. 8*p*. From that circumstance it is argued that either the parties were making, or the Court was making, a material alteration in the contract effected by the bond. But there is this answer to the contention: the bond is not perfectly without doubt as to its construction. Certainly one construction may be that interest did not carry interest in any year until the 24th of Assin had come round, and in that case interest for these two months would not accrue on interest if payment of the simple interest were made by the 24th of Assin. That is one construction which may be put upon the bond. Of course another construction is that interest accrued from day to day or from month to month upon interest as well as principal, and that the whole accumulated sum was payable on the 24th of Assin; but it is at least conceivable that the parties took the first construction, and in that case it seems that this small item of Rs.650 10*a*. 8*p*. would be as much as could be claimed as due at the date of the decree.

On the other view of the case there would be something more due than Rs.650 10*a*. 8*p*., but it would be something so small as to lead to the conclusion, either that the parties may not have taken it into consideration at all, or that taking it into consideration it was the price of the Defendants' consent to a decree that some small sum less than what was actually due should be charged against them. Either of those explanations is a perfectly reasonable explanation, and it seems to their Lordships to be putting a very great strain upon the introduction of this item of Rs.650 10*a*. 8*p*. into the account stated at the foot of the decree, to make it the basis of an inference that the Court and the parties intended to alter this exceedingly important term of the bond.

J. C.
1893
GANGA PERSHAD SAHU v. LAND MORTGAGE BANK OF INDIA.

The result is that their Lordships will humbly advise Her Majesty that the High Court were wrong on this point, and that the decree made by the High Court should be varied by striking out of it the following words:—"On the basis of his decree of the 19th of March, 1877, with simple interest at the rate of 12 per cent. per annum from that date on the entire amount of the decree," and by substituting these words:—"Under the mortgage bond of the 7th of August, 1873, interest being calculated according to the terms of that instrument." The rest of the decree will be affirmed.

Their Lordships will humbly advise Her Majesty accordingly. The Respondents must pay the costs of the appeal.

Solicitors for Appellant: *T. L. Wilson & Co.*
Solicitors for Respondents: *Freshfields & Williams.*

J. C.*
1893
Nov. 16, 17; *Dec.* 16.

TEWARI JASWANT SINGH . . . . . DEFENDANT;

AND

LALA SHEO NARAIN LAL . . . . . PLAINTIFF.

AND CROSS-APPEAL.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Evidence—Hoondi Transactions.

Case in which it was held, upon evidence as to which there had been conflicting findings by the Courts below, that the Plaintiffs had proved the genuineness of the hoondi transactions in respect of which they sued.

CONSOLIDATED APPEAL AND CROSS-APPEAL from a decree of the High Court (Feb. 21, 1889), reversing a decree of the Subordinate Judge of *Mainpuri* (April 30, 1887).

The facts are stated in the judgment of their Lordships.

The first Court held that the hoondis sued upon were forgeries, the High Court that they were genuine.

Doyne, for the Appellant.

* *Present*:—LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, and SIR RICHARD COUCH.

Branson, and *Ross*, for the Respondent.

1893. Dec. 16. The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

The Plaintiff in this suit, who is Respondent in the principal appeal, sued the Defendant, who is Appellant in that appeal, for principal and interest due on six hoondis drawn by the Defendant for the aggregate sum of Rs.13,600 upon the firm of *Gobin Das Lachhman Das* of *Bombay*. The date of the hoondis was the 1st of April, 1886, and they were made payable sixty-one days afterwards.

The plaint was filed on the 11th of December, 1886. It describes the Plaintiff as proprietor of the firm *Dilsukh Rai Radha Kishan* in the town of *Etawah*, and the Defendant as a Brahman resident in the district of *Etawah*. The case made is to the effect that from the year 1881 to 1886 the Defendant was in the habit of raising money from the Plaintiff's firm by drawing hoondis on *Bombay* or *Calcutta*, which were never presented to the drawee, but when due were met partly by payment and partly by renewal; that the hoondis of April, 1886, were drawn in this course of dealing; that not being duly met they were presented at *Bombay*, and were dishonoured by the *Bombay* firm, who denied all knowledge of their writer.

In his written statement the Defendant met the Plaintiff's case by a flat denial of the whole. He says that the hoondis are forgeries; that the *Bombay* bankers are unknown to him and are in collusion with the Plaintiff; that he never purchased or sold a hoondi; that he does not even know the way in which a hoondi is drawn; that he has no account-books, nor any banking shop, nor does he carry on any trade; that his only business is advancing loans and holding zemindari estates; that he never had any dealings with the Plaintiff even for a day; that the Plaintiff's family and his are at enmity; and that the Plaintiff's motive is to satisfy a grudge and to defame the Defendant.

The evidence given in the case is of three kinds: first, that which bears directly upon the making and delivery of the hoondis in suit; secondly, that which relates to handwriting;

J. C.
1893
TEWARI JASWANT SINGH v. LALA SHEO NARAIN LAL.

and, thirdly, that which goes to shew that the Defendant did raise money on hoondis, and that the course of dealing between the parties was such as the Plaintiff alleges.

Each side dwelt very strongly on the improbabilities attending his opponent's case. On the Plaintiff's side it is said to be incredible that he, who is a prominent banker in *Etawah* and the head of the Treasury there, should from greed or, as the Defendant suggests, from spite, concoct a series of elaborate forgeries, and procure a number of other persons to aid him by forgery and perjury, at the risk of severe punishment and absolute commercial and social ruin. On the Defendant's side it is said to be incredible that he, who is a person of large estates, great wealth, and high social rank in *Etawah*, should raise money for years by giving hoondis, and those drawn on firms unknown to him or to the Plaintiff's house; or that, if he did so, he should have the effrontery to perjure himself by denying transactions which he must have supposed to be capable of easy proof. Their Lordships confess that there is not much, if any, exaggeration in these arguments; and that the antecedent difficulties of each case appear so great that no help can be got by trying to balance them nicely against one another.

Not much more help is afforded by the direct evidence of persons who speak to the making of the hoondis and their transmission to the Plaintiff's house. The Subordinate Judge who tried the case did not believe these witnesses. The High Court mention their evidence without comment on its credibility. Their Lordships do not here comment in detail upon it. It was closely examined in the argument, and the Plaintiff's counsel hardly contested the opinion then expressed by their Lordships that it is quite untrustworthy.

The evidence of handwriting is left in a very unsatisfactory state. Before the Subordinate Judge no comparison of undoubted handwriting with the disputed handwriting was made. What was done was this: The Judge made an officer of the Court read out one of the hoondis while the Defendant sat in Court and wrote it from dictation; he then referred the documents to two pleaders for comparison; they reported that

the papers were not in one and the same hand; the Judge agreed with them, and so decided against the genuineness of the hoondis in suit. It is obvious that such a test as this would at best be hardly adequate; and that it might be actually misleading, because the Defendant would have a motive for disguising his hand. The Judges of the High Court compared the hoondis with some admitted signatures of the Defendant; but the only conclusion they drew was that there were no such differences as would justify them in finding that the evidence which went to support the hoondis was false.

Their Lordships now turn to the Plaintiff's books and to the evidence connected with them, which formed the main ground for the decision of the High Court in favour of the Plaintiff. The Subordinate Judge dealt with this part of the case in a very summary way, saying that "an account-book is nothing; it is one's private affair, and he may prepare it as he likes." It is true that there may be accounts to which that description would apply. Other accounts may be so kept, and may so tally with external circumstances, as to carry conviction that they are true. And the *Evidence Act*, s. 34, therefore enacts that entries in books of account regularly kept in the course of business shall be relevant evidence, though not sufficient of themselves to charge any person with liability. The accounts in question are of such a nature that Mr. *Doyne* stated very fairly that unless they are forged the hoondis must be genuine.

The books are proved by the Plaintiff's gomashta *Gulzari*, who says that they shew the daily accounts entered by himself and his brother, and are all genuine and correct. Extracts are given in the Record. There is a cash-book, a bill-book, and a ledger, all referring to one another. Tracing some items through the extracts, their Lordships find the correspondence between the books to be exact, and there is no suggestion made that any discrepancy exists. It must be confessed that to forge elaborate accounts extending over six years, or even to insert new sheets in such accounts, would be a most dangerous undertaking, and to make the different books correspond exactly would be a task of almost insuperable difficulty.

But there is even a better test of genuineness than the

J. C.
1893
TEWARI JASWANT SINGH v. LALA SHEO NARAIN LAL.

correspondence of the books with themselves, and that is their correspondence with other evidence. To apply this test their Lordships have traced the history of some of the items as disclosed by the Record.

They take item 13 in the list on p. 128 of the Record, as extracted from the account book. It is there entered that a currency note for Rs.1000, No. 30,477, was given to the Defendant on the 31st of May, 1883, and that he paid for it partly by drawing two hoondis for Rs.800, and partly in cash; and that this note was given in Government revenue on the 1st of June, 1883, through *Wazir Ali* in the tehsil of *Etawah*. In the bill-book the same transaction is entered, with the addition that the hoondis were drawn on the firm of *Gobind Das Lachhman Das*. In the cash-book the same transaction is entered, shewing that the Defendant was debited with only the sum of Rs.775 12*a*. for his hoondis. In the Rokar-bahi (another cash-book) it is shewn that the Plaintiff received in cash Rs.224 4*a*. on the sale of the currency note, leaving Rs.775 12*a*. to the debit of the Defendant. The Lekha-bahi or ledger, under the head of "Account of *Tewari Jaswant Singh*," enters the payment of Rs.775 12*a*. to his debit, and the hoondis on *Bombay* at the rate of Rs.96 15*a*. 6*p*. per cent. (equal to the gross amount of Rs.775 12*a*.) to his credit. These books, except the list, as to which it does not appear from what book it was extracted, contain cross-references to one another.

Pausing there, it is fit to remark that not only is there no discrepancy between the several books, but each book appears to contain that amount of difference which is appropriate to its character. The bill-book gives an additional particular (of importance, as it happens) with respect to the hoondis, viz., that they were drawn on *Gobind Das*. The two cash-books shew the exact amount of cash paid and received by the Plaintiff and the Defendant respectively on the sale of the currency note. The ledger sums up the net result of the transaction. It is difficult to believe that any forger would have the cleverness to think of such things, but in the course of regular book-keeping they would come naturally enough.

The matter, however, does not rest there. The register of the

Etawah Treasury shews that on the 1st of June, 1883, a note, No. 30,477, for Rs.1000, was paid in by *Wazir Ali* on account of revenue due from the Defendant. *Wazir Ali* is the Defendant's servant. He was not called. The Defendant called himself immediately before the hearing of the case, but said nothing on this point. It is placed beyond doubt that the Defendant had the currency note, and paid for it partly by hoondis drawn on *Gobind Das.*

Their Lordships will now take item No. 24 in the same list. The transaction here set down is that a hoondi drawn by the Defendant, through *Man Singh*, a broker, on the 14th of December, 1884, for the sum of Rs.2500, was bought by the Plaintiff, and paid for by crediting one *Durga Pershad* with Rs.1800, and paying Rs.625 through *Puran Singh.* The bill-book shews that the hoondi was drawn on *Gobind Das*, and that the discount was 3 per cent. The Rokar-bahi shews the payment of the Rs.625 through *Puran* on the day following the date of the hoondi. In the Lekha-bahi there are apparently two entries, one debiting and crediting the full amount of Rs.2500; the other crediting the Defendant with the amount of the hoondi less the discount, and debiting him with the two payments to *Puran Singh* and *Durga Pershad*, equal to Rs.2425.

Durga Pershad was examined. He stated that the Defendant held a house upon lease from him, and that in Sambat 1941 (a year which would include the 14th of December, 1884), he had received from the Plaintiff's house the sum of Rs.1800, on account of rent due from the Defendant, and had duly given the Defendant credit. He received the balance, Rs.700, through *Wazir Ali.* He produced his account-books in confirmation of this statement. The Defendant, who was examined on his own behalf five days after the examination of *Durga Pershad*, says nothing about it, and he does not call *Wazir Ali* or *Puran Singh*, both his servants.

Their Lordships take it as conclusively proved by independent testimony that the sum of Rs.1800 shewn by the Plaintiff's books to be paid to *Durga Pershad* on the Defendant's behalf was so paid, that the Defendant has had the benefit of the

J. C.
1893
TEWARI JASWANT SINGH v. LALA SHEO NARAIN LAL.

payment, and that the consideration which he gave for it was a hoondi drawn on Gobind Das.

Their Lordships need not go through other items in the books nor deal with the evidence shewing that the Defendant had bill transactions with other people. The cases they have examined are sufficient, in the entire absence of countervailing evidence, to establish three propositions. They prove that the Defendant's sweeping denials of his connection with bill transactions are not true, and thereby they materially shake his credit. They prove that he drew hoondis on *Gobind Das* and sold them to the Plaintiff, thereby displacing the Defendant's flat denial of dealings with the Plaintiff, and meeting the improbability that he should have drawn upon a house unknown to him by proof of the fact that he did so. They lead to the belief that the Plaintiff's books are authentic and honest, and his gomashta's evidence true, so that the course of the dealing alleged by the Plaintiff terminating in the six hoondis now sued on is supported.

Their Lordships agree with the High Court that the Plaintiff's case is a true one and the Defendant's false; and they will humbly advise Her Majesty to dismiss the Defendant's appeal.

The Plaintiff has presented a cross-appeal, on the ground that the decree of the High Court does not give any interest subsequent to their decree. On this point there is no dispute between the counsel. Mr. *Doyne* admits that interest should be given, and Mr. *Branson* admits that the omission is a mere slip which might have been set right on application to the Court, and that he cannot ask for more than 6 per cent. On this appeal, therefore, their Lordships will humbly advise Her Majesty to vary the decree by directing that the amount decreed should bear interest at 6 per cent. per annum until payment.

Each party should bear his own costs of the cross-appeal. The Appellant must pay the costs of the principal appeal.

Solicitors for Appellant: *Pyke & Parrott.*
Solicitors for Respondent: *Barrow & Rogers.*

GOSWAMI SHRI 108 SHRI GIRDHARIJI SHRI GOVINDRALJI MAHARAJ. . . } PLAINTIFF;

AND

SHRI GOVERDHANLALJI GIRDHARIJI MAHARAJ . . . . . } DEFENDANT.

J. C.*
1893
Nov. 14.

ON APPEAL FROM THE HIGH COURT AT BOMBAY.

Jurisdiction—Letters Patent, 1865, s. 12—"*Carry on Business*"—*Priest—Offerings of Devotees.*

The expression in the 12th section of the *Letters Patent* of 1865, "carry on business," relates to business of a kind in which actionable debts may be contracted:—

Held, that the high priest of a shrine, who temporarily visited *Bombay*, and whilst there received offerings from its devotees either personally or through his agents, did not carry on business within the meaning of the above section, and was not liable on that ground to the jurisdiction of the High Court.

APPEAL from a decree of the High Court (July 24, 1891), affirming a decree of Mr. Justice *Farran* (June 20, 1890). Both Courts answered in the negative the following issue, "whether the Court has jurisdiction to hear and determine this suit having regard to the allegations contained in paragraph 1 of the written statement."

That paragraph is as follows:—

(1.) The Defendant says that he is not a resident of *Bombay*, but resides at *Nathdwara*. In the month of February, 1889, the Defendant left *Nathdwara* for the purpose of visiting certain holy places in *Gujerat Kathca*, and other parts of *India*. On the 2nd of April, 1889, the Defendant arrived in *Bombay* from *Ahmedabad*, on a temporary visit only. The Defendant submits that this honourable Court has no jurisdiction to hear and determine this suit.

The allegations of the Appellant in his plaint had been that he was the achariya or high priest of the *Vaishnar* community, and

* *Present*:—LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, and SIR RICHARD COUCH.

J. C.
1893
GOSWAMI SHRI 108 SHRI GIRDHARIJI SHRI GOVINDRAIJI MAHARAJ v. SHRI GOVERDHANLALJI GIRDHARIJI MAHARAJ.

maharaj *Tikait* of the shrine of *Shri Nathji*, at *Nathdwara*, in the territories of His Highness the Rana of *Oodeypore*, and that in the year 1876 he had been forcibly deported from the said territories, and had ever since been prevented from returning there; and that at the time of such deportation he had in his inner treasury a large amount of private treasure belonging to him, which he alleged was entrusted by him to the care of his son, the Respondent, to protect the same and remit it to him. The Appellant relied in his plaint on certain letters dated respectively the 8th of July, 1876, and the 8th of December, 1880, purporting to have been written and sealed by the Respondent at *Nathdwara*, and to acknowledge that he had in his custody at *Nathdwara* aforesaid, as a deposit belonging to the Appellant, certain treasure specified in the former of the said letters, and in Schedule C to the said plaint, of the value of Rs.3,145,171.

Farran, J., held that the Respondent did not either (*a.*) dwell, or (*b.*) carry on business, or (*c.*) personally work for gain within the local limits of the Court on the true construction of the 12th section of the High Court Charter. The High Court took the same view.

The facts are stated in the judgment of their Lordships.

Mayne, and *Branson*, for the Appellant, contended that on those facts, as they had been summarised by *Farran*, J., and are stated in the judgment of their Lordships, the Respondent "carried on business" within the local limits of the jurisdiction invoked. They cited *Smith* v. *Anderson* (1); *Rolls* v. *Miller* (2).

Sir *John Rigby*, S.G., *Finlay*, Q.C., and *Sutton*, for the Respondent, were not heard.

The judgment of their Lordships was delivered by

LORD MORRIS :—

The suit out of which this appeal arises was brought by the Appellant against the Respondent in the High Court of Judicature at *Bombay* in the exercise of its ordinary original civil juris-

(1) 15 Ch. D. 247. (2) 27 Ch. D. 71.

diction, and the question for determination in the High Court and here is whether the High Court had jurisdiction to hear and determine the suit. Both Courts below have determined that there was no jurisdiction.

The 12th section of the *Letters Patent* of 1865, establishing the High Court, is as follows, so far as it is material to the matter now in dispute:—"And we do further ordain that the said High Court . . . shall be empowered to receive, try, and determine suits of every description . . . if the Defendant at the time of the commencement of the suit shall dwell, or carry on business, or personally work for gain within such limits."

The greater portion of the arguments in the Courts below was addressed to the contention that the Defendant "dwelt" in *Bombay*, within the meaning of the section, and that therefore he was liable to the High Court's jurisdiction. That point was abandoned by the Plaintiff on the argument before this Board, his counsel confining himself to the contention that the Defendant "carried on business" within the meaning of the section.

The phrase "carry on business," as has been often said, is a very elastic one, and is almost incapable of definition. The tribunal must in each case look to the particular circumstances. It appears to their Lordships that the *Letters Patent* intended it to relate to business in which a man might contract debts, and ought to be liable to be sued by persons who had business transactions with him.

There is nothing of this kind here. The Defendant is the high priest of the shrine of *Shri Nathji*, at *Nathdwara*, in the territories of the Rana of *Oodeypore*. At the time of this suit he was on a temporary visit to *Bombay*, for the purpose of meeting his devotees. He has in *Bombay* an establishment called a "pedi," in which a treasurer and servants are regularly employed. Into this "pedi" offerings made by devotees to the shrine of *Shri Nathji*, and to other shrines at *Nathdwara*, of which the Defendant claims to be the owner, are paid. The Defendant has similar establishments in other places in the *Bombay* Presidency, and the offerings collected there are transmitted to the "pedi" in *Bombay*. Something like two lacs of rupees pass into

J. C.
1893
GOSWAMI SHRI 108 SHRI GIRDHARIJI SHRI GOVINDRAIJI MAHARAJ v. SHRI GOVERDHANLALJI GIRDHARIJI MAHARAJ.

this "pedi" in the course of each year. While the Defendant was in *Bombay* he received his followers, and when invited to do so he visited their houses. On the occasions of such visits he invariably received an offering in money, but no bargain for the amount was made beforehand. Such offerings were strictly personal, and were not paid into the "pedi."

Their Lordships are unable to hold that either the payment of the offerings into the "pedi," or the receipt of them by the Defendant personally, constitutes "carrying on business" within the meaning of the *Letters Patent*. Devotion to the shrine was the reason for the offerings in each case.

Their Lordships will therefore humbly advise Her Majesty that the judgment of the Appellate Court should be affirmed and this appeal dismissed. The Appellant will pay the costs of this appeal.

Solicitors for the Appellant: *Hores & Pattisson.*
Solicitor for the Respondent: *E. F. Turner.*

MAHANT GAJRAJ PURI . . . . . PLAINTIFF;

AND

ACHAIBAR PURI. . . . . DEFENDANT.

J. C.*
1893
Nov. 22;
Dec. 16.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Evidence—Membership of sect of Nihangs—Succession.

Where the Plaintiffs claimed to succeed to the property in suit according to the rules of succession in favour of disciples which prevail amongst the sect of Nihangs:—

Held, after examination of evidence, upon which the Courts below had arrived at conflicting findings, that the Plaintiffs had failed to prove that the deceased proprietor had belonged to that sect.

APPEAL from a decree of the High Court (March 9, 1889) reversing a decree of the Subordinate Judge of *Gorakhpur* (March 30, 1887).

The Plaintiffs sued to recover from the Defendant three villages, which were admittedly in the possession of one *Zalim Puri*, at the time of his death. The Defendant claimed to retain possession of them as being the son of *Zalim Puri*. The Plaintiffs were not related to *Zalim Puri*, but asserted that he was a fakir of the Nihang sect, and that his property passed, not according to the rules of secular succession to his natural heirs, but by the special custom of the sect according to the rules of religious succession to his fellow disciples, that is to themselves. The original Court took this view and decreed in favour of the Appellant, who represented the original Plaintiffs. The High Court took the contrary view and dismissed their suit. The question for the decision of the Board was by what rule the succession to the property in dispute is governed.

The facts of the case are stated in the judgment of their Lordships.

The Subordinate Judge decreed in favour of the Plaintiffs. He was of opinion that *Zalim Puri* was a Nihang fakir, but that he had contracted a marriage contrary to the usage of the sect.

* *Present*:—LORD WATSON, LORD HOBHOUSE, LORD SHAND, and SIR RICHARD COUCH.

J. C.
1893
MAHANT GAJRAJ PURI v. ACHAIBAR PURI.

He then held that upon the general principles of Hindu Law applicable to ascetics the Plaintiffs and not the Defendant were his heirs. Independently of this principle, he considered that the Defendant could in no case be *Zalim's* heir, since upon the evidence of his mother *Mussammat Mona* herself, it appeared that she was of a superior caste to her husband, and therefore the marriage was invalid.

The High Court reversed this decree. The Judges examined the general Hindu Law as to succession to persons of a religious character, and expressed their opinion "that the Plaintiffs are not, nor was *Zalim Puri* in his lifetime, persons or a person who could come within the rule of the Hindu Law relating to Mendicants and the succession to their property." As to the alleged special custom governing the sect of Nihangs, they came to the conclusion "that if there was any such custom among Mahants, that custom will have no applicability to a case like the present, where *Zalim* is proved to have been for years a married man, and where according to the evidence of several witnesses for the Plaintiffs, that fact would have excommunicated him from the order of Nihangs, and according to the Plaintiffs' own statement of the 16th of April, 1879, that fact negatived the possibility of his belonging to the family of Nihangs." Being therefore of opinion that the Plaintiffs had made out no title to the property they considered it unnecessary to decide whether the Defendant was legitimate or the reverse.

Mayne and *Cowell*, for the Appellant, contended that by the custom as proved the succession in the line of disciples prevailed amongst the sect of Nihangs; that is, that the members of the brotherhood inherited to each other as if they were related by blood in preference to natural heirs. There was no evidence which would exclude *Zalim* from the operation of such custom, of which several instances were admitted. The Defendant's evidence did not exclude married Nihangs from the rule of succession. On the contrary, it introduced a special rule in favour of a legitimate son.

Doyne, for the Respondent, was not heard.

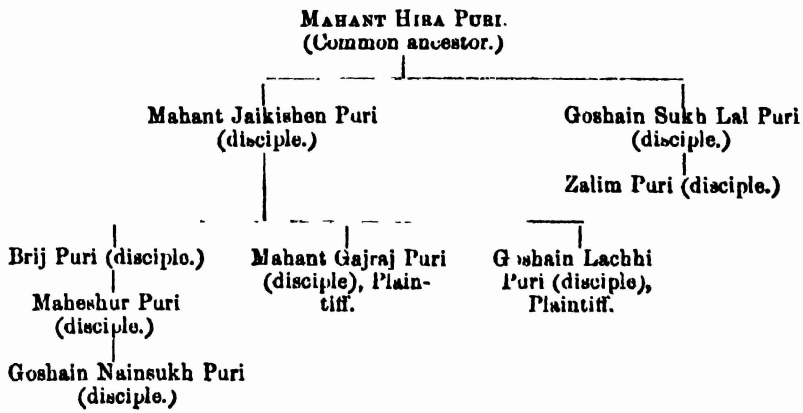
1893. Dec. 16. The judgment of their Lordships was delivered by

LORD SHAND:—

This suit was instituted in the Court of the Subordinate Judge of *Gorakhpur* in July, 1886. The original Plaintiffs, now represented by the Appellant, claimed right to three villages in the *Gorakhpur* district, called *Belwa*, *Anarhua*, and *Bhartarsota*, which had been in the possession of one *Zalim Puri* for some years prior to his death in 1884, and which after that event were registered in April, 1885, by the Revenue authorities in the name of his son, the Respondent *Achaibar Puri*, and have since been possessed by him or on his behalf by his mother as his guardian. The Subordinate Judge gave effect to the Plaintiffs' claim, but on appeal his judgment was reversed by the High Court of *Allahabad*.

The question is one of succession. The Plaintiffs were not related to *Zalim Puri*, but have rested their claim to the villages in question on the allegation that he was a fakir of the Nihang sect, and that his property consequently passed, not according to the ordinary rules of succession to his natural heirs, but according to the rules of religious succession to the Plaintiffs claiming to be his fellow disciples.

The following is the genealogical tree, which was embodied in the plaint, for the purpose of shewing the alleged relationship of the parties as members of the same spiritual brotherhood:—



The Plaintiffs alleged that *Sukh Lal Puri*, guru (preceptor)

J. C.
1893
MAHANT GAJRAJ PURI v. ACHAIBAR PURI.

of *Zalim Puri*, and Mahant *Jaikishen Puri*, guru of the Plaintiffs, were spiritual brothers, that is disciples of the same guru; that this gaddi (seat of a Mahant) belonged to the Nihang order, being ascetics who live in a state of celibacy; and that the rule of succession is that a guru is succeeded by his disciple, and in default of a disciple by his spiritual brother, and in his default by his spiritual cousin; and the Plaintiffs claimed right to succeed to the property of *Zalim Puri* as his spiritual cousins, he having died without leaving any immediate disciple.

In regard to the property in dispute the Plaintiffs alleged that it was purchased by *Jaikishen Puri* with seven other villages in the name of the Plaintiffs and *Zalim Puri* and *Maheshur Puri* with his own funds; that he himself continued to be the owner during his lifetime, and that on his death the Plaintiffs and *Maheshur Puri* succeeded to the possession of it; that on the death of *Maheshur Puri* his disciple *Nainsukh Puri* succeeded to possession jointly with the Plaintiffs, and as he had no disciple, the Plaintiffs on his death became the owners having right to possession of his estate. The plaint further stated that on the death of *Zalim Puri* competing petitions for the mutation of names in regard to the three villages in dispute had been presented by the Plaintiffs and by the Defendant under the guardianship of his mother, the latter of these petitions having been given effect to by the Revenue authorities; and the Plaintiffs averred that *Zalim Puri* had not in fact been married, and that the Defendant is not the son, nor his mother *Mussammat Mona* the wife of *Zalim Puri*. In regard to the right and possession of *Zalim Puri* of the villages in dispute during his lifetime the Plaintiffs stated that after the death of *Jaikishen Puri* they had agreed in the settlement by compromise of an application by *Zalim Puri* for mutation of names in respect of all the villages, to *Zalim Puri's* possession of the three villages in question "during his lifetime by way of management," and that *Zalim Puri* had acknowledged the Plaintiffs' ownership in respect of the other seven villages.

The defence consisted of a denial of the alleged religious connection between the Plaintiffs and *Zalim Puri*, and a denial that *Zalim Puri* was a member of the religious sect of Nihangs;

and the Defendant averred that from the outset, when the ten villages were originally acquired in 1853, *Zalim Puri* in his own right became one of the joint owners, and did not merely succeed to a right on the death of *Jaikishen Puri*; that further, in 1879, in the proceedings for mutation of names his separate and independent right, not of possession only, but of independent property in the three villages in question had been recognised and settled and thereafter acted on; and that in these proceedings the Plaintiffs, in direct opposition to the view they now plead as the basis of their claim, had asserted and maintained that *Zalim Puri* was not a member of the sect of Nihangs, who do not marry, but that he was married and had a wife and children; and that the original purchase of the ten villages was a purchase such as is made by people of different castes, but did not mean that the purchasers belonged to one and the same family.

The Subordinate Judge expressly found that *Zalim Puri* was married to *Achaibar's* mother, and that the Plaintiffs in 1862, and again in 1879, had admitted that the disputed property belonged to *Zalim Puri* as owner; and the judgment of the High Court on appeal contains the following important findings: "The result of the evidence is that we find that the villages in question were not purchased exclusively by *Jaikishen* with his own money, as alleged by the Plaintiffs; but, on the contrary, that *Zalim Puri* did purchase a one-third share in each of these villages with his money, and that he enjoyed that share during his lifetime before the date of the compromise, and subsequently the villages in suit under the compromise. We also find as a fact, and there is ample evidence in support of it, that *Zalim Puri* married *Mussammat Mona*, and that the Defendant is his son." To which the learned Judges add with reference to the Plaintiffs' title to maintain the suit: "It is not necessary to consider in this case whether it was a valid marriage unless and until the Plaintiffs have satisfied us that they have made out a *primâ facie* title against the Defendant"—an observation which is clearly well founded.

The Subordinate Judge held that it was proved that *Zalim Puri* was a Nihang, and that according to the principles of the

J. C.
1893
MAHANT GAJRAJ PURI v. ACHAIBAR PURI.

Hindu Law recognised in the case of ascetics of that order, the succession to his estate devolved on the Plaintiffs as his spiritual cousins. On the question of fact he seems to have relied entirely on the oral evidence of the Plaintiffs, so far as can be gathered from the terms of his judgment.

The only question which it is necessary should be determined is, whether it has been proved that *Zalim Puri* was a member of a religious body of Nihangs, in which the rules of succession in favour of disciples prevailed.

The Appellant's counsel was constrained to admit that the evidence adduced entirely failed to establish the averments in the plaint in two important particulars which have been already noticed. The Plaintiffs not only failed to prove that the original acquisition of the whole villages was made by *Jaikishen Puri* as the head of a religious body or family, and that *Zalim Puri* had acquired by succession from him as a disciple of the family, but it has been on the contrary held to be proved that *Zalim Puri's* share in these villages was purchased with his own money. Again the Plaintiffs not only failed to prove that as the result of the compromise in 1879, *Zalim Puri* acquired a right of possession only in the three villages in dispute, but it has been conclusively proved that he obtained an independent and exclusive right which he possessed and exercised till the time of his death. The sulehnama by which the suit was compromised bears that "As a future arrangement it has been settled that I, *Zalim Puri*, shall be in possession of the entire mauzas *Belwa*, *Bhartarsota* and *Asarhua*, together with the sair and other rights appertaining thereto, without the participation and interference of any one else; and we, *Gajraj Puri*, and *Lachhi Puri*, shall remain in possession of the entire mauzas *Bhadroha*, *Bajrabhari*, *Khera*, *Bewdwa*, *Botal* and *Kodai*, and of an eight-anna share in mauza *Sumera*, together with the sair and rights appertaining thereto. So neither party has, nor will have, any connection or concern with the other;" and in the wajib-ul-arz of one of the mouzahs, while held jointly by *Gajraj Zalim* and *Nainsukh*, and which was recorded by them in 1862, one of the conditions of the tenure was thus expressed:—

Paragraph 5: "Relating to the mode of alienation of the

property.—Every shareholder has a right to transfer his own share. But at the time of transfer it will be his duty to give notice and offer to sell or mortgage it at a proper consideration to his near sharer first, and in case of his refusal, to his other sharer of the village. If he does not agree or pay proper consideration for the same, he will then have power to transfer it to any one he likes. No pre-emption plea will then be entertainable."

In these circumstances the Appellant's counsel was able only to found upon two means of proving the averment that *Zalim Puri* was one of the sect of Nihangs; the first being two successive descents of shares of the mouzahs in question which are said to have followed in favour of disciples and members of the sect of Nihangs and not of natural heirs; and the second consisting of the parole testimony adduced. The Plaintiffs refer to the transfer statements taken from the Revenue books for the years 1290 and 1291 Fasli (1883–84) relating to these mouzahs in which *Gajraj* and *Lackhi* were represented as disciples of *Jaikishen*, and *Zalim* was represented as a disciple of *Sukh Lal*, and from which it is inferred that *Maheshur's* share descended on his death to *Nainsukh* as his disciple, and that the share of *Nainsukh* on his death fell to *Gajraj* and *Lachhi* the Plaintiffs, also in their character as disciples. But, assuming that the entries founded on do shew that in these two instances the succession was as alleged, this circumstance alone falls a long way short of what would be required to prove that *Zalim Puri* belonged to the sect of Nihangs, or that as to his separate property the rule of succession by a disciple applied, controlling the ordinary law of succession. The entries seem to be inconsistent with the arrangement of the 31st of May, 1879, by which the entire mouzahs *Belwa*, *Bhartarsota* and *Anarhua* were given to *Zalim Puri*. They were made, it may be assumed, on the requisition of *Gajraj* as lambardar of the villages. They are really in substance but one entry, for each of them is simply a repetition of the first, and so far is this carried that in the last of them in September, 1884, *Zalim Puri's* name is entered for his share though he had died in June of that year.

In regard to the oral testimony there are no doubt a number of witnesses who say that *Zalim Puri* was a member of the

J. C.
1893
MAHANT GAJRAJ PURI v. ACHAIBAR PURI.

spiritual body to which they depone the villages belonged. On the other hand, there are many witnesses for the defence to the contrary effect. The Plaintiffs' witnesses, however, in many instances, cannot be relied on; because, though professing to have had very full means of knowledge of *Zalim Puri's* life and circumstances, they give an untrue account of his connection with the joint property as a purchase made, so far as he was concerned, with his own means, and because they declare that *Zalim Puri* was not married and had not a son. Their Lordships are unable to place reliance on such evidence as proof of the facts, the onus of establishing which lies on the Plaintiffs. On the other hand, it is worthy of notice that the Plaintiff *Gajraj* did not himself appear as a witness, and that while all the Plaintiffs' witnesses say the Nihangs "do not marry," *Zalim Puri* certainly openly married and became a householder, many years before his death, and for these years led a domestic life with his wife and family. The regularity of his marriage was, no doubt, open to question with any one having a title to challenge it, because of the difference of caste between the parties; but its importance and that of the family life he led are not thereby destroyed as facts bearing on the question of his having been a Nihang. Their Lordships are, however, disposed to agree with the learned Judges of the High Court, that the position taken up by the Plaintiffs in the proceedings of 1879, looked at in the light of the whole evidence now before the Board, is decisive against the Appellant's present contention. In their petition of the 16th of April of that year, presented as "shareholders and lambardars of mauza *Belwa*," filed with reference to a petition by *Zalim Puri* to have their names expunged and his name entered in respect of a certain share of that village, they alleged:—

"5. The genealogical table is entirely wrong, because the Petitioners' (objectors') gaddi is occupied by Nihangs, who do not marry. When the Petitioner has married and has got a wife and children, and he is a householder, he cannot belong to the family of the Petitioners. The genealogical table alleged by the Petitioner is wrong. People of different castes make purchases in a mauza, but that does not mean that they belong to one and the same family."

Their Lordships cannot better express the contrast between this statement and the position which the Plaintiffs now after the lapse of many years seek to assume in their present plaint, than by referring to the following passage from the judgment of the High Court, in which reference is also made to the Plaintiffs' pleading in a proceeding in March of the same year 1879 :—

"Now every single allegation contained in para. 5 of the petition of 1879 is a direct contradiction of the Plaintiffs' case here. They say here that *Zalim Puri* was a Nihang. They said then that he was a married man. They say here that he never was married, and must have been without a child. In para. 5 they said that he was a married man and had issue. They say here that he was a Nihang, which excludes the notion of his being a *griastha.* They said there that he was married and was a householder, and thus could not belong to the family to which they belonged. They said in 1879 that he did not belong to the order of religious mendicants, and they account in their petition of 1879 for his being recorded in these villages, not on the ground that he was a disciple by descent from *Jaikishen Puri,* but by the suggestion that persons of other caste might be casually associated in purchases in the same village. On the 25th of March, 1879, these persons who now say that *Zalim Puri* was a member of their religious family of Nihangs and a Sanyasi, and who claim that he was by religious descent a spiritual brother of theirs, denied that he was the religious son of *Jaikishen.* They styled themselves in the previous suit as zemindars. What did they say about *Zalim Puri* in that suit? They did not describe him as the son of *Jaikishen Puri.* If their case here is true, he was as much a son of *Jaikishen Puri* in religion as they were through *Sukh Lal Puri.* This was the religious connection between them if their case is true. But they then described *Zalim Puri* as a person whose parentage was unknown in 1879. These persons now come and say that because *Zalim Puri* was a disciple of *Sukh Lal Puri,* who was a disciple of *Hira Puri,* from whom they are descended in their religious pedigree, they are entitled to succeed to the property left by *Zalim Puri.* It is curious that in 1879, if their present case is true, they should have described *Zalim Puri* as a person

J. C.
1893
MAHANT GAJRAJ PURI v. ACHAIBAR PURI.

whose parentage was unknown. If their case was true they would have described him as they do now."

Their Lordships agree with the learned Judges of the High Court in holding that the Plaintiffs have failed to prove that *Zalim Puri* was a member of the sect of Nihangs; and they will therefore humbly advise Her Majesty that the judgment of the High Court ought to be affirmed and the appeal dismissed. The Appellant must pay the costs of the appeal.

Solicitors for Appellant: *Ranken Ford, Ford & Chester.*
Solicitors for Respondent: *Pyke & Parrott.*

J. C.*
1893
Nov. 15; *Dec.* 9.

ABDUL WAHID KHAN . . . . . DEFENDANT;

AND

SHALUKA BIBI AND OTHERS. . . . . PLAINTIFFS.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSION OF OUDH, LUCKNOW.

Law of Pre-emption—Oudh Laws Act, 1876—*Claims by Adverse Title and by Pre-emption inconsistent—Account of Mesne Profits—Co-sharer not Liable to share Costs of successful Litigation, unauthorized by him.*

In a suit to recover from a co-sharer possession of the Plaintiff's moiety of certain immoveable property with mesne profits from the date of suit, it appeared that the Plaintiff had sold a half-share of her moiety to her co-Plaintiffs, the price being the amount of costs to be incurred and of her maintenance, while the Defendant relied on a prior conveyance to himself of the whole moiety which was concurrently found not to have been executed :—

Held, that the Defendant could not as an alternative defence claim to pre-empt the share sold to the co-Plaintiffs. His position was inconsistent with a claim by pre-emption, and in its essence the transaction with the co-Plaintiffs was the sale of a share in a law-suit against himself:

Held, further, that the Plaintiff was not entitled to a decree for mesne profits before suit, but that the Defendant could not obtain an account of disbursements made by him on behalf of the estate unless he offered at the same time to account for his receipts:

Held, further, that the Defendant having successfully prosecuted an

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* *Present*:—LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, and SIR RICHARD COUCH.

appeal to the Privy Council involving title to a considerable part of the estate, a moiety of which was in suit, was not entitled, either in equity or on the ground of implied contract, to charge the Plaintiff with a moiety of the costs incurred. The proceedings were taken for his own benefit, and without authority, express or implied, from the Plaintiff.

APPEAL from a decree of the Judicial Commissioner (June 27, 1889), affirming a decree of the District Judge of *Rae Bareli* (March 29, 1888).

The Respondent, *Shaluka Bibi*, and the Appellant were respectively mother and husband of *Muradi Bibi*, deceased, and by Mahomedan law entitled to her estate in equal moieties. The Appellant took possession of the whole, and *Shaluka Bibi* sued to recover her moiety, with mesne profits, from the date of suit.

The Appellant unsuccessfully pleaded a bazdawa (deed of withdrawal) in his favour of the said moiety. Both Courts held that it was never executed.

The alternative defences to the action were as follows:—

Shaluka Bibi had joined with her as co-Plaintiffs her three brothers, who had by registered deed of the 25th of January, 1886, become the purchasers from her of a moiety of her share of *Muradi Bibi's* estate—that is a 4-annas share of the whole. The Appellant contended, in the 9th paragraph of his written statement, that *Shaluka Bibi* had ample funds at her disposal for the purpose of carrying on this suit, and that her "brothers simply for their own benefit and pabandi (control) have got the sale deed executed in their favour." He submitted that the sale deed was invalid because he had a "right of pre-emption in respect of that property," and prayed that the claim of the three co-Plaintiffs thereunder should, "in consequence of Defendant's right of pre-emption, and upon payment of Rs.10,000, price entered in the sale deed, be dismissed."

A further contention of the Appellant was that all debts, whether secured by hypothecation of property or not, that were due from *Muradi Bibi* till her death, must have precedence over inheritance, and should be satisfied out of *Muradi Bibi's* assets; and that the Plaintiffs should be declared liable to pay according to shares all those debts, both those which had been liquidated by the Appellant, in reference to which he claimed to stand in

J. C.
1893
ABDUL WAHID KHAN v. SHALUKA BIBI.

the shoes of the satisfied creditors, as well as those which were still unliquidated; and also all sums of money which the Appellant had expended in good faith in prosecuting suits instituted for protecting the property, particularly of an appeal to the Privy Council, which had saved a large portion of *Muradi Bibi's* estate from the hands of an adverse claimant, and that Plaintiff's possession should be made conditional upon payment of the said charges.

The District Judge, without expressing any opinion for or against the right of pre-emption as claimed by the Appellant, said: "In a suit like this I do not feel inclined to decide the question of right of pre-emption, for, even supposing that I would like to decide the point in Defendant's favour, I could not give him a decree for pre-emption. Nor can I with reference to that contention declare null and void the right of Plaintiffs 2, 3, and 4, which flows from the right of inheritance of Plaintiff No. 1, and hold that portion of the claim which relates to it liable to dismissal. Defendant in this suit does not admit the *factum* of sale and the seller's right to transfer. Indeed, he claims the lady seller's right to and power of transfer, and impugns the transfer as invalid. Right of pre-emption arises from a sale actually admitted by the pre-emptor. Thus, it is a question by itself which cannot be decided except by a separate suit in which the opposite party thereof may have every opportunity of urging all kinds of pleas relating to that title and claim."

The Appellant contended in appeal that the District Judge was bound to decide the question of his right of pre-emption in this suit, and had erroneously omitted to do so. But the Judicial Commissioner agreed with the District Judge "that such a claim could hardly be decided in a suit where the fact of a good sale, the basis of a claim for pre-emption, is itself denied."

With regard to the Appellant's claim in respect of *Muradi Bibi's* debts, the District Court ruled that "there is no doubt that Plaintiffs are to the extent of their shares liable for those debts which are due from *Muradi Bibi*, and this has been also admitted by the Plaintiff's pleader in regard thereto." But with regard to the amount of those debts which according to the admission of the parties was Rs.43,956 5*a*. 6*p*. at the death of *Muradi Bibi* it

recorded this finding: "The debt that has to be paid up, a proportionate share of which to the extent of half shall have to be paid by the Plaintiff out of her legal share, amounts to Rs.32,542."

The District Judge arrived at this total by disallowing all debts which had been discharged by the Appellant, and he did so on this ground: "The Defendant ought to have given strong and satisfactory evidence to prove that he did not pay the debts out of the receipts from the property; but, on the contrary, he paid the same out of his own pocket, or by contracting a special debt. But he has absolutely failed to do so."

With regard to disbursements made by the Appellant to protect the estate while in his possession, consisting mainly of costs incurred in several suits, notably in that of the Privy Council appeal of *Abdul Wahid Khan* v. *Mussamat Nuran Bibi* (1), the District Judge disallowed the whole of them, with observations to the effect that the mesne profits were amply sufficient for the purposes stated. The Appellant, he added, is "not a trustee or mortgagee in respect of the Plaintiff's share in the property in dispute. He is, on the contrary, a trespasser; whatever he has done he has not done in the interests of the Plaintiff or for the protection of the property, in consideration of the fact that she had a share in it. In fact he has acted in the same way that a wrongful trespasser would act in his own interests in respect of the trespassed property."

The Judicial Commissioner dismissed the appeal with costs.

Cowell, and *J. H. Arathoon* (*Cowie*, Q.C., with them), for the Appellant:—

Cowell contended that the Courts below were wrong in disallowing the claim by pre-emption. He referred to Act XVIII. of 1876, sects. 6, *et seq.*, and to *Asgur Mahomed* v. *Nuzeema Bibi* (2). The right to possession founded on a right to pre-emption is a good defence to an action of ejectment. It was none the less so because an alternative defence is a claim of title paramount to that of the vendor from whom he claims pre-emption. Such a right to possession is a ground of defence which may and ought to be

(1) Law Rep. 12 Ind. Ap. 91. (2) 14 Suth. W. R. 272.

J. C.
1893
ABDUL WAHID KHAN v. SHALUKA BIBI.

raised in this suit within the meaning of sect. 13, explanation 2, of the Civil Procedure Code; and if the Appellant had not taken it he would have been deemed to have abandoned it. The Appellant's claim to pre-emption was that of a co-sharer, and was within the meaning of *Oudh Laws Act*, 1876. The price should be taken to have been Rs.10,000, the right of the Appellant being to have his name substituted for that of the Respondents as the purchaser for that amount.

With regard to the accounts, it was contended that inasmuch as the Respondents did not claim mesne profits prior to the filing of their plaint, they were not entitled to an account thereof, or in the absence of an account to have any sums declared to be an ascertained amount of mesne profits for such period, or to have any unascertained amount applied in their favour to the discharge of principal sums due by *Muradi Bibi*.

Further, that the Respondents were liable to defray half of all expenses *bonâ fide* incurred for the protection of the estate, especially for the costs of the successful appeal to the Privy Council, of which the Respondents had the benefit. The principle on which such claim rested was that it was in the nature of salvage: see *Dakshina Mohun Roy Chowdhry* v. *Sarola Mohun Roy Chowdhry* (1) and *Peruvian Guano Company, Limited* v. *Dreyfus Brothers & Co.* (2).

J. H. Arathoon contended that the Respondents' suit having been brought more than three years after they were aware of the forged conveyance under which the Appellant claimed title, was barred by limitation: see Act XV. of 1877, art. 92, the effect of which was to cut down limitation from twelve to three years on the principle laid down in *Rani Janki Kuar* v. *Raja Ajit Singh* (3). [Their Lordships held that art. 92 was inapplicable to the case.]

Doyne, and *C. W. Arathoon*, for the Respondents, were not heard.

(1) Law Rep. 20 Ind. Ap. 160. (2) [1892] A. C. 166.
(3) Law Rep. 14 Ind. Ap. 148.

1893. Dec. 9. The judgment of their Lordships was delivered by

SIR RICHARD COUCH :—

The suit in this appeal was brought against *Abdul Wahid Khan* for possession of a half-share of property left by *Muradi Bibi* deceased. She was the daughter of *Shaluka Bibi* and the wife of *Abdul Wahid*, and died on the 10th of January, 1881, leaving them her only heirs. On her death *Abdul Wahid* took possession of all the property left by her. These facts were not denied by *Abdul Wahid*. His first ground of defence was that *Shaluka Bibi*, by a deed dated the first of February, 1881, in consideration of a maintenance of Rs.50 a month during her lifetime, withdrew her claim to any right and interest in the estate of *Muradi Bibi*; and the first issue in the suit was, whether this deed was executed by *Shaluka Bibi*. It has been found by both the lower Courts that it was not, and this ground of defence is therefore disposed of.

Another defence as to part of the property claimed was founded on a right of pre-emption in the Defendant. On the 26th of January, 1886, *Shaluka Bibi* executed a deed, in which it is stated that *Abdul Wahid* had taken possession of the whole of the property left by *Muradi Bibi*, and that *Shaluka Bibi* could not raise funds to defray the costs of litigation and personal expenses, and that *Niamat Khan*, *Ramzan Khan*, and *Wazir Khan*, her brothers and legal heirs, had consented to arrange for payment of all costs of litigation and her personal expenses, on condition that whatever she obtained by way of inheritance and as dower (meaning dower due from *Abdul Wahid* to *Muradi Bibi*) should be shared and possessed with them, and that she should join them in the suit against *Abdul Wahid*. The deed, after providing against any compromise of the suit without the consent of the brothers, and agreeing to the aforesaid terms, concluded thus: "Let it also be known that *Niamat Khan*, *Ramzan Khan*, and *Wazir Khan* shall hold themselves responsible for all costs of suit and my maintenance, and that the said costs of the suit and the said maintenance of the executant, which will be incurred from the Court of first instance to that of the last resort, will be consideration for the transfer made by virtue of this deed, which

J. C.
1893
ABDUL WAHID KHAN v. SHALUKA BIBI.

is and will be binding upon the executant. Approximate value of the property, and the dower, &c, to the extent of a moiety thereof is and will be rupees 10,000." The three brothers were joined as Plaintiffs in the suit with *Shaluka Bibi.* The Defendant in his written statement alleged that the sale-deed was invalid, because by the deed of the 1st of February, 1881, *Shaluka Bibi* had no longer any power of alienation, and if she had, the Defendant had a right of pre-emption in respect of the property, and that no notice as required by law was issued. He claimed that upon payment of Rs.10,000, the price entered in the sale-deed, the suit should be dismissed. It is an error to treat the Rs.10,000 as the price; it is given as the value of the property sold, apparently for the purpose of stamp duty. The price is really what would be incurred for costs, the amount of which was uncertain and would depend upon the resistance which the Defendant made in the suit.

The law of pre-emption in *Oudh* is in the *Oudh Laws Act,* 1876. By sect. 9 the Defendant as a co-sharer with *Shaluka Bibi* was entitled to a right of pre-emption. Sect. 10 enacts that when any person proposes to sell any property in respect of which any person has a right of pre-emption, he shall give notice to the persons concerned of the price at which he is willing to sell it. Sect. 11 enacts that any person having a right of pre-emption in respect of any property proposed to be sold shall lose such right unless within three months from the date of such notice he or his agent pays or tenders the price aforesaid to the person proposing to sell. By sect. 13 any person entitled to a right of pre-emption may bring a suit to enforce it, on the ground that no due notice was given, or that tender was made and refused, or in the case of a sale, that the price stated in the notice was not fixed in good faith. This law is not applicable where the person who would be entitled to pre-emption denies the title of the person who proposes to sell, and alleges that they are not co-sharers, and that he is entitled to the whole of the property. The Defendant, by setting up the deed of 1881, did this. He being in possession of the property, *Shaluka Bibi* was obliged to raise money to defray the costs of a suit to recover her share, which she did in the usual and probably the only way available

in such cases. The consideration was, the providing the money necessary for carrying on the suit, the amount of which could not be estimated. If the Defendant succeeded and the suit was dismissed, there would have been no property to be sold. In truth the transaction was a sale of a share in a law-suit. The position taken up by the Defendant was altogether inconsistent with claiming a right of pre-emption.

The Defendant also claimed that if the Plaintiffs should be held to be entitled to a decree they should also be declared liable to pay according to shares all the debts of *Muradi Bibi* liquidated by the Defendant, as well as all sums of money which the Defendant expended in good faith in prosecuting suits instituted for protecting the property. The District Judge found that of eleven debts due from *Muradi Bibi* in a list given by the Defendant, amounting to Rs.43,956 5*a.* 4*p.*, six remained due which the Plaintiffs would have to pay in proportion to their share. *Muradi Bibi* died on the 10th of January, 1881. The suit was brought on the 16th of September, 1886. The Defendant had therefore been in possession and receiving the mesne profits for upwards of five and a half years. The plaint only claimed mesne profits accrued during the pendency of the suit till the date of obtaining possession. The Defendant alleged that he had paid the remaining five debts, and he contended that, the mesne profits before the suit not being claimed in the plaint, he was entitled to keep them and also to receive what he had paid in discharge of the debts. The District Judge rightly refused to allow this, and the Judicial Commissioner on appeal affirmed this decision. It is true that the Plaintiffs could not claim to have a decree for those mesne profits, but if an account was to be taken of the Defendant's payments, it must also be taken of his receipts. Apparently his receipts from the Plaintiffs' share of the property were much more than sufficient to satisfy the debts.

The remaining question relates to the money expended by the Defendant in prosecuting suits for, as he describes them, protecting the property. The particulars of these expenses are given in a list B in his written statement. A suit had been brought in *Muradi Bibi's* lifetime against her for a share in the entire estate held by her, and on her death the Defendant and *Shaluka Bibi*

J. C.
1893
ABDUL WAHID KHAN v. SHALUKA BIBI.

were made Defendants in it as her representatives. The Plaintiffs in that suit obtained a decree in the Court of the Judicial Commissioner in their favour. The Defendant first applied to the Judicial Commissioner for a review. He was unsuccessful in that application, and he then appealed to Her Majesty in Council. He succeeded in this appeal, and the decree of the Judicial Commissioner was reversed. There were also suits for mesne profits defended by him which failed in consequence of this reversal. The list B is composed of the costs of these suits and interest on money borrowed to pay them. *Shaluka Bibi* took no part in these proceedings, having up to the making of the decree of the Judicial Commissioner appeared in the suit and defended separately. In the present appeal the Defendant claimed to be allowed a proportion of those costs, on the ground that the Plaintiffs had got the benefit of the reversal of the decree of the Judicial Commissioner. This is not a ground for making the Plaintiffs liable for any portion of those costs. The proceedings were taken by the Defendant for his own benefit, and without any authority express or implied from the Plaintiffs; and the fact that the result was also a benefit to the Plaintiffs does not create any implied contract or give the Defendant any equity to be paid a share of the costs by the Plaintiffs. This claim has been disallowed by the lower Courts, and their Lordships will humbly advise Her Majesty to affirm the decree of the Judicial Commissioner and to dismiss this appeal. The Appellant will pay the costs of it.

Solicitors for the Appellant: *Walker & Rowe.*
Solicitors for the Respondent: *T. L. Wilson & Co.*

GREENDER CHUNDER GHOSE . . . . PLAINTIFF;

AND

TROYLOCKHONAUTH GHOSE AND OTHERS DEFENDANTS.

J. C.*
1892
Nov. 10, 11.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Practice—Unnecessary length of Records—Construction of Deeds—Release of Future and Contingent Interests.

Where under a will three brothers took the residuary estate in equal shares, and the eldest, on the death of one without issue, sued to recover a moiety of his third share under a gift over :—

Held, that on the true construction of certain deeds of compromise and partition between the brothers, that even if the Plaintiff were entitled under the gift over as claimed, every interest which he had or could claim thereunder had passed by the deeds.

Their Lordships ensured the unnecessary length of the record which in this case was filled with irrelevant matter.

APPEAL from a decree of the High Court (March 18, 1889), reversing a decree of Mr. Justice *Trevelyan* (Sept. 3, 1888), and dismissing the suit with costs.

The litigation in this case related to the construction of the will of *Anundonarain Ghose*, and to certain documents which had been executed by the members of his family interested in his estate under his will. The suit was brought by the Appellant to establish his right under a gift over in the testator's will to a moiety of the share taken under the will by one of his two brothers who had died without issue.

The deeds in question were certain deeds of conveyance or release executed by the three sons of the testator, viz., *Greender Chunder*, *Moninder Chunder*, and *Noyender Chunder*. The operative part of the leading instrument, dated the 18th of May, 1861, was as follows :—

"They, the said *Greender Chunder Ghose* and *Moninder Chunder Ghose*, do and each of them doth by these presents grant, bargain, sell, alien, and release, and by way of conveyance only and not by way of warranty of title, do and each of them doth also

* *Present* :—LORD HOBHOUSE, LORD MACNAGHTEN, LORD SHAND, and SIR RICHARD COUCH.

J. C.
1892
GREENDER CHUNDER GHOSE v. TROYLOCKNONAUTH GHOSE.

grant and confirm unto the said *Noyender Chunder Ghose*, his heirs, representatives, and assigns, the parcels of land therein particularly described, and all the estate, right, title, interest, use, trust, property, possession, possibility, claim, and demand whatsoever, both at law and in equity of them, &c."

Mr. Justice *Trevelyan* held that, under the will, the share given to *Noyender*, one of the younger sons of the testator, was defeasible upon his death without sons, and that a moiety thereof passed to the Appellant under the gift over; and that there was nothing in any of the deeds which disposed of the Appellant's rights under the gift over.

The High Court inclined to the opinion that the gift over only took effect in case the son died without issue before attaining his majority; but that, on the contrary assumption, every possible claim which the Appellant was capable of getting rid of, including his claim, if any, under the gift over, was taken out of him by force of the deeds.

Cowie, Q.C., *Graham*, Q.C., and *Cave*, for the Appellant, contended that the general words in the operative clauses of the conveyances related only to the then interests of the parties and not to any future or contingent interest, such as that now claimed by the Appellant under the defeasance clause and gift over contained in the will. They referred to the surrounding circumstances, correspondence, and the general position and objects of the parties as favouring that construction of the clauses.

Sir *Horace Davey*, Q.C., and *Branson*, for the Respondents, were not called upon.

1892.
Nov. 11.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN:—

There were two questions raised in this appeal. One depends upon the true construction of the will of *Anundonarain Ghose*, the father of the Appellant, *Greender Chunder Ghose*, and of his two younger brothers, who were minors at the date of the will and at the date of the death of the testator. The other depends

upon the construction and effect of certain instruments made between the three brothers after the two younger had attained their majority. Unless both can be answered in accordance with the contention of the Appellant, the appeal must fail. Their Lordships are of opinion that one at least of these questions must be answered in favour of the Respondents.

Under the will of *Anundonarain* the three brothers were entitled in equal shares to the residuary estate of the testator. The question on the will is: Did the two younger brothers on attaining majority take an absolute interest, which they could deal with as they pleased, or did they take an interest liable to be divested or defeated in the event of death without issue, natural or adopted? Mr. Justice *Trevelyan* decided in favour of the latter view. The inclination of the opinion of the Appellate Court was the other way, but the matter was not finally decided.

Their Lordships also will leave this question undetermined. They are not prepared at present to assent to the view which commended itself to Mr. Justice *Wilson*. But as they have not heard counsel for the Respondents it would not be proper to express an opinion upon the point.

Assuming that Mr. Justice *Trevelyan* was right so far, their Lordships agree with the Appellate Court that the instruments executed by the Appellant on the occasion of the compromise and partition operated to pass every interest of every kind which the Appellant had or could claim to have in the shares allotted to the younger brothers. So long as those instruments stand it appears to their Lordships impossible for the Appellant to contend with success that any interest, present, future, or contingent, was reserved to him.

Their Lordships may add that there is nothing on the face of the deeds, or in the previous agreement, or in the position of the parties, to suggest that this was not in accordance with the intention of every one concerned. They agree with Mr. Justice *Wilson*, "that looking at the deeds, the object of the parties was once for all to dispose finally of the father's estate, and of all questions connected with the father's estate."

The parties were acting under legal advice. They were

J. C.
1892
GREENDER CHUNDER GHOSE v. TROYLOCKNONAUTH GHOSE.

effecting a separation of interests derived under the will. It is very unlikely that an obvious provision of the will should have been overlooked. It is almost inconceivable that the younger brothers, who were in a position to dictate terms, would have consented to take their shares subject to an executory gift in favour of their elder brother, which, however remote and however inconsiderable at the time, would have had the effect of making it impossible for them during their lives to dispose of the property by sale or mortgage. Their Lordships therefore entirely concur in the judgment of the Appellate Court.

There is one other point which perhaps ought to be mentioned. Their Lordships very much regret that, in order to assist them to determine these two simple questions, it should have been thought necessary to furnish them with a record of such enormous length. Nearly 300 pages are taken up by the schedules to the answer in the original suit, not one word of which in any circumstances could have any bearing on the questions before their Lordships. Their Lordships have more than once commented upon the bulk of records sent from India. They will consider whether some means cannot be devised to save litigants in future from this idle expense.

Their Lordships will humbly advise Her Majesty that this appeal ought to be dismissed, and the Appellant must pay the costs.

Solicitor for the Appellant: *J. F. Watkins.*
Solicitors for the Respondents: *Barrow & Rogers.*

LUKHI NARAIN JAGADEB . . . . . PLAINTIFF;

AND

MAHARAJA JODU NATH DEO AND OTHERS DEFENDANTS.

J. C.*
1893
Nov. 21;
Dec. 9.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Procedure—Civil Procedure Code, s. 584—Jurisdiction of High Court in Review —Boundary Line of Waste Lands—Onus probandi.

Where a disputed line of division runs between waste lands which have not been the subject of definite possession, the ordinary rule regarding the onus upon a Plaintiff seeking demarcation does not apply. The duty is on the Defendant as much as on the Plaintiff to aid the Court in ascertaining the true boundary.

Where the first Court had adopted as correct a boundary line ascertained by an amin using his own compass, and the judge affirmed such finding of fact after having remitted the case to the amin, who on the remit using a different compass returned an entirely different boundary line:—

Held, that the High Court had no jurisdiction under sect. 584, Civil Procedure Code, to review this finding. Disregard of the amin's second report was not a substantial error or defect of procedure within that section, and no error in law was shewn.

APPEAL by special leave from a decree of the High Court (June 7, 1888), which reversed two decrees in favour of the Appellant, that of the District Judge of *Cuttack* (Sept. 2, 1886), and that of the Subordinate Judge of *Cuttack* (March 3, 1885).

The question in appeal was whether the land to which it related was part of the Appellant's mouzah called *Argal*, or of the Respondents' mouzah called *Dimirpal*.

The facts of the case and the proceedings in the suit, which was for a declaration of boundary, are stated in the judgment of their Lordships.

The District Judge in affirming the decree under appeal to him after the second report of the amin, said that he agreed with the amin, that the result of adopting the mode of measurement and demarcation resorted to on the second investigation, was to throw lands of mouzah *Argal*, which were not in dispute in the suit, into the disputed plot. He considered that the Defendant

* *Present*:—LORD WATSON, LORD HOBHOUSE, LORD SHAND, and SIR RICHARD COUCH.

J. C.
1893
LUKHI NARAIN JAGADEB v. MAHARAJA JODU NATH DEO.

"chose to assume an attitude of indifference" during the former measurement, and did nothing to ensure its correctness, but merely asked to be allowed to controvert its results after it was finished. He thus explained his order of remand to the amin for the preparation of a fresh map, and his treatment of the second report.

"In order to form some opinion as to what the difference would be in the run of the boundary, if the necessary allowance for the variation of the compass be made, the amin was made to retrace the boundary on his map with corrected bearings; the result being to make matters much more against the Plaintiff than they were before, as none of the disputed land with this alteration falls into *Argal*, and a good deal of admitted *Argal* land will fall into *Dimirpal*. It is not open to me to order that this amendment be made the basis of final settlement. The Defendant cannot indeed ask me to do this, for his view is that a wrong starting-point was taken, and this is really what I have to consider now. Can this Defendant claim to have the work done over again, or should matters be left as they are? As it is, a line has been made which will at all events tend to stop litigation, and gives a proportion of the disputed land to each party?

"On this matter I am not disposed to think that any further working at the case is likely to be anything but an infructuous expenditure of time and a protraction of the dispute. The Defendant, who moves the Court, has made no offer to place at the disposal of an amin the instrument without which he says himself the boundary cannot properly be traced. There is no theodolite at the disposal of the Court, nor have I any means of obtaining one. Valuable instruments like these are not to be had on loan. I am thus of opinion, that what has been done the Defendant is not entitled now to undo. This disposes of the Defendant's appeal, which is dismissed with costs."

The Respondent preferred a special appeal to the High Court, which on the 13th of June, 1887, held that the decree of the District Judge could not be sustained, and called up the case "as a regular appeal before ourselves, to go through the evidence and come to the best decision we can."

On the 7th of June, 1888, the High Court gave judgment, the effect of which was that the first report of the amin was found to be erroneous, on reference to the survey office and the executive engineer; that such references were made with the consent of both parties; that the second report and map of the amin ought to be accepted as correct, and that the suit should be dismissed except as to the small piece of land of two acres or thereabouts as therein mentioned.

C. W. Arathoon, for the Appellant, contended that the High Court had no jurisdiction on second appeal to call up the case as a regular appeal, and come to a fresh finding on the evidence. The decision of the District Judge being that of the first Appellate Court, was final on a question of fact. See *Mussummat Durga Choudhrain* v. *Jawahir Singh* (1); *Ramratan Sukal* v. *Mussumat Nandu* (2).

Reference was made to sect. 584 of the Civil Procedure Code, and it was contended that there was no error in law or defect in procedure within the meaning of that section. It was within the discretion of the Judge to disregard the second return of the amin, and to confirm the first on a comparison between the two. There was no foundation for the statement contained in the judgment, and also in another judgment of the High Court in review, that the parties had agreed to accept the references to the survey office and the executive engineer.

Doyne, and *Cave*, for the Respondent the maharaja, contended that under the circumstances of the case the High Court had jurisdiction to make the order of the 13th of June, 1887. Both Courts treated the question in dispute as one relating to the character and method and principle of the amin's investigation and report. Neither party adduced any other evidence. The ruling therefore of the lower Court was not a mere finding on evidence, but related to a question of law and procedure within the meaning of sect. 584. See *Ramgopal* v. *Shamskhaton* (3); *Ranee Surnomoyee* v. *Latchmeeput* (4). No objection was taken to the action of the High Court in treating the appeal as a

(1) Law Rep. 17 Ind. Ap. 122.
(2) Law Rep. 19 Ind. Ap. 1.
(3) Law Rep. 19 Ind. App. at p. 228.
(4) 9 Suth. W. R. 339, 341.

J. C.
1893
LUKHI NARAIN JAGADEB v. MAHARAJA JODU NATH DEO.

regular appeal; either at the hearing or in the application for review, or in the petition to the High Court for leave to appeal to the Privy Council. The order of the 13th of June was made in the Appellant's interest, and in accordance with his contention. In any view, the order dismissing the suit was within the jurisdiction of the High Court in second appeal.

Arathoon, was not heard in reply.

1893
Dec. 9.

The judgment of their Lordships was delivered by

LORD WATSON:—

The deceased maharaja *Pudmalabh Deo* was zemindar of two mouzahs, *Argal* and *Dimirpal*, in the district of *Cuttack*, which were separated by a mutual boundary running from north to south, *Argal* being on the west, and *Dimirpal* on the east of the line. In the year 1868, his interest in mouzah *Argal* was sold in execution of a decree, and was purchased by one *Babu Kanhia Lal Pundit*, who instituted the present suit. On the death of the maharaja he was succeeded by his son *Jodu Nath Deo*, who is the Respondent in this appeal; and, on the death of *Kanhia Lal*, his interest in mouzah *Argal*, and in this suit passed to one *Ram Gobind Jagadeb*, and on his decease was acquired by the present Appellant.

The action was brought in March, 1877, before the Subordinate Judge of *Cuttack*, for a declaration that a strip of ground, about eighty acres in extent, lying on the eastern verge of *Argal*, formed part of that mouzah. The maharaja *Pudmalabh Deo*, whilst he denied, in his written statement, that any portion of the land claimed belonged to mouzah *Argal*, did not assert that mouzah *Dimirpal* extended westwards, at any point, beyond the western boundary of the area in dispute.

After a great deal of preliminary litigation, issues were adjusted and sent to trial. The only one of them to which this appeal relates was in these terms: "Is the land in dispute part of the Plaintiff's estate mouzah *Argal*?"

The area claimed by the Plaintiff consisted admittedly of waste land or jungle, and consequently no evidence of possession

was adduced on either side. The Plaintiff produced and founded upon the government survey map of 1839; and a remit was made to an amin of the Court to ascertain whether the disputed land, or any portion of it, fell within the outlines of mouzah *Argal* as shewn on the map. Before proceeding to carry out the remit the amin represented to the Court that he could not do so with absolute accuracy, unless he had the transverse table upon which the map was based, and a theodolite. The Court not being in a position to furnish him with either, and neither of the parties offering to supply the want, directed the amin to proceed with such materials as he had at his command. Acting under that direction the amin fixed the starting-point at the southern extremity of the boundary line, by taking the evidence of villagers, in presence of the parties or their agents, and used his own compass in laying down the line northwards.

The amin thereafter made his report, accompanied by a map upon which the boundary was laid down, and the evidence which he had taken for his assistance. The boundary included in mouzah *Argal* about forty-seven acres of the area claimed by the Plaintiff, and assigned the remainder to mouzah *Dimirpal.* The Defendant then examined the amin as a witness, with the view of shewing the inaccuracy of his report, and adduced no other evidence. The Subordinate Judge gave effect to the report, and decreed that the Plaintiff do recover possession of these forty-acres as shewn in the map prepared by the amin. Their Lordships think it impossible to affirm that, as the Respondent argued, there was no evidence before the Court upon which that finding —which is a pure finding of fact—could be rested. They assent to the observation made by the Judge that "scientific accuracy is hardly to be expected in such cases, substantial justice being all that is necessary for practical purposes." It is of frequent occurrence, especially in cases where the disputed line of division runs between waste lands which have not been the subject of definite possession, that no satisfactory evidence is obtainable. That circumstance cannot relieve the Court of the duty of settling a line, upon the evidence which is laid before it. The ordinary rule regarding the onus incumbent on the Plaintiff has really no application to cases of that kind. The parties to the suit are in

J. C.
1893
LUKHI NARAIN JAGADEB v. MAHARAJA JODU NATH DEO.

the position of counter-claimants; and it is the duty of the Defendant, as much as of the Plaintiff, to aid the Court in ascertaining the true boundary. Were any other rule recognised, the result might be that some boundaries would be incapable of judicial settlement.

The decree was brought under review of the District Court of *Cuttack*. The District Judge, with the view, apparently, of correcting any error which might have arisen from the amin using his own compass, communicated with the survey officials of the *Orissa* circle, which comprehends the land in dispute, and was informed by them that the meridional lines on the survey maps were intended to shew the true north, and that the meridional line indicated by a magnetic compass would, in that locality, shew a deviation which "might be taken to be 2° 50′ east." Having received that information, the District Judge remitted to the same amin to lay down, upon the map prepared by him, a new boundary line giving effect to the deviation. The amin did as he was directed, with the somewhat startling result that the new line included in mouzah *Dimirpal*, not only the whole of the disputed land with the exception of a small area, about two acres in extent, but, in addition, about fifty-three acres of land which, it had not been disputed, belonged to mouzah *Argal*. Upon considering the case, in the light of the information obtained from the survey officials and of the amin's report to him, the District Judge adhered to the boundary first laid down by the amin, and affirmed the judgment of the Subordinate Court.

Before this Board, the Respondent maintained that the Judge's disregard of the amin's second report constituted a substantial error or defect in procedure, within the meaning of sect. 584 (*c*) of the Civil Procedure Code. But he was unable to point out any defect in the conduct of the case: the only error upon which he relied in argument was one which, if it was committed at all, was committed by the Judge, and consisted in his drawing a wrong conclusion from the evidence. The decision of the District Judge, so far as it went, involved no principle of law, and was entirely within his competency. There can be no legal presumption that the line shewn on the map of 1839 was laid

down according to the true north, or that it necessarily represents the real boundary between the mouzahs. Its accuracy in these particulars must depend upon what was actually done by the persons who made the survey, and transferred the line to the map of 1839, and also upon the information by which they were guided. There can be no necessary presumption of fact, either that a line dividing jungle land was laid down with scientific exactitude, or that the precise boundary was a whit better known in 1839 than at the time when the amin made his survey for the purposes of this case.

The Respondent presented an appeal to the High Court, and objections to its competency were heard before *Tottenham* and *Norris*, JJ., who ordered the case to be taken up as a regular appeal, and to be decided on the evidence. In delivering their reasons for that decision, they observed that "the District Judge's judgment is very unsatisfactory as to the *ratio decidendi* that the Civil Court amin fell into error. We are not satisfied that there was evidence before him which justified his finding." And they added: "We think that the proper course is to call up the case as a regular appeal before ourselves, and go through the evidence and come to the best decision we can." It is clear that, in adopting that course, the learned judges exceeded the statutory limits of their jurisdiction. They had no power to entertain the case except as an appeal from an appellate decree, and that only upon the grounds specified in sect. 584 of the Civil Procedure Code, which deprives them of the right to review findings of fact by the First Appellate Judge, unless these are tainted with one or other of the errors or defects specified in its sub-sections. Upon that point, it is sufficient to refer to the recent decisions of this Board, in *Mussummat Durga Choudhrain* v. *Jawahir Singh Choudhri* (1), and *Ramratan Sukal* v. *Mussumat Nandu* (2).

The case was accordingly heard, as a regular appeal, before *Norris* and *Beverley*, JJ., who set aside the judgments of the Courts below, gave effect to the line of boundary laid down by the amin on remit from the District Judge, and found that the small excepted area of two acres was the only portion of the

(1) Law Rep. 17 Ind. Ap. 122. (2) Law Rep. 19 Ind. Ap. 1.

J. C.
1893
LUKHI NARAIN JAGADEB v. MAHARAJA JOGU NATH DEO.

disputed land belonging to mouzah *Argal.* For that area they gave decree in terms of the plaint.

The terms of the judgment delivered are certainly calculated to suggest that the learned judges had applied their minds to the evidence in the case, and had come to an independent conclusion. They pass in review the whole proceedings which had taken place before the Subordinate and District Courts with a view to the elucidation of the boundary, and then go on to say, "we are of opinion that this retracing of the amin ought to be accepted as correct." It appears, however, that their decision was not really intended to proceed upon a reversal of the District Judge's findings of fact. The case again came before the same learned judges, on an application for review; and, on that occasion, they concurred in stating that their decision was due to their having formed the opinion "that the parties agreed to accept the district engineer's statement, whether it was correct or not, as the basis upon which the measurement should be made." Seeing that no allegation had been made or proof tendered of any agreement to that effect, its existence must have been matter of legal inference from the record.

When thus explained, the ground upon which the case was disposed of by the High Court was sufficient to justify an appeal under sect. 584. It appears to their Lordships that the District Judge must be held to have erred in law, within the meaning of that clause, if the record discloses a judicial agreement by both parties to accept as conclusive a boundary laid down upon the amin's map deviating the original line in accordance with the information given by the government engineer. The Respondent's counsel had very little to say in support of such an agreement; and their Lordships have been unable to discover any trace of one in the record, or any circumstance which could bar the present Appellant from objecting to the effect of the information or of the remit which followed upon it. There is no more room for suggesting that the Appellant agreed to abide by the second remit, than for the suggestion that *Pudmalabh Deo* agreed to accept the first.

Their Lordships will, therefore, humbly advise Her Majesty to reverse the judgment appealed from, and to restore the

judgment of the District Judge. The Respondent, *Jodu Nath Deo*, must pay the costs in the High Court and the costs of this appeal.

J. C.
1893
LUKHI NARAIN JAGADEB v. MAHARAJA JODU NATH DEO.

Solicitors for the Appellant: *T. L. Wilson & Co.*
Solicitor for the Respondent, *Jodu Nath Deo*: *J. F. Watkins.*

MAKUND RAM SUKAL. . . . . PLAINTIFF;

AND

SALIQ RAM SUKAL . . . . . DEFENDANT.

J. C.*
1893
Nov. 23, 24;
1894
Jan. 27.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONERS OF THE CENTRAL PROVINCES OF INDIA.

Award—Failure to dispose of all Matters referred—Consent of Parties.

The ground upon which an award which does not dispose of all the matters referred is held to be invalid, is, that there is an implied condition that it shall do so.

Where an award divided parts of property referred for division, the parties thereto agreeing to the division being made by steps, and that each division should be final and not dependent on a complete partition being ultimately effected:—

Held, that such consent validated the award, though otherwise it might have been *ultrà vires* of the arbitrators.

APPEAL from a decree of the Judicial Commissioner (July 16, 1888), modifying a decree of the Commissioner of the *Nerbudda* Division (August 28, 1887).

The main question in the appeal was as to the validity of an award made under an agreement to refer the partition of certain ancestral and other property, and objected to as indefinite and incomplete.

The facts of the case, and the lengthy proceedings in the Courts below are set out in their Lordships' judgment.

Finlay, Q.C., and *C. W. Arathoon*, for the Appellant, contended that the award was bad as being uncertain in its terms and

* *Present*:—LORD WATSON, LORD HOBHOUSE, LORD SHAND, and SIR RICHARD COUCH.

J. C.
1894
MAKUND RAM SUKAL v. SALIQ RAM SUKAL.

incomplete, inasmuch as it did not effect a complete partition of all the property referred. The intention of the parties was that there should be a complete and not a partial partition. Reference was made to *Randall* v. *Randall* (1); *Stone* v. *Phillips* (2); *Wakefield* v. *Llanelly Railway and Dock Company.* (3)

Mayne, and *Allbless*, for the Respondent, contended that the incompleteness of the award did not, under the circumstances, vitiate it. The fact that the partition was not fully completed was entirely owing to the wilful and persistent obstruction of the Appellant. The piecemeal division which was from time to time effected, was by actual or constructive agreement of the parties. Such division was treated by them as final, and in no way dependent upon the partition of the whole property being ultimately effected.

Arathoon, replied.

1894
Jan. 27.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

Makund Ram, the Appellant, and *Tulsi Ram*, the father of the Respondent, were brothers, and the suit from which this appeal arises was brought by *Makund Ram* against *Tulsi Ram* for partition of moveable and immoveable property in their joint possession, full details of which were given in lists annexed to the plaint. *Tulsi Ram*, in his written statement, admitted that he and *Makund Ram* were brothers and were entitled to the property in equal shares; but he submitted that the greater part of it had been partitioned, and that *Makund Ram*, the Plaintiff, was only entitled to claim partition as regards such of the property as remained unpartitioned, the particulars of which were given in Schedules F and G to the written statement. He alleged that by an agreement dated the 14th of May, 1874, it was referred to arbitrators appointed by the parties to make partition of all the property; that the arbitrators met and proceeded step by step, at the request and with the

(1) 7 East, 81. (2) 4 Bing. N. C. 37.
(3) 11 Jur. (N.S.) 456.

consent of the parties, to divide the great bulk of the property, and the Plaintiff and Defendant each took possession of what came to his share, and prayed that the property which had not been partitioned or divided might be partitioned and divided by the Court.

The agreement to refer is in these terms:—

"We, *Makund Ram* and *Tulsi Ram Sukals*, are zemindars of mouza *Bhonas* tahsil *Harda*, in the *Hoshangabad* district. Whereas we, both brothers, are not on good terms with each other, it is evident that it is not proper now to live jointly. Within British dominions each of us two brothers is entitled to half-and-half share of moveable and immoveable property whether ancestral or self-acquired or standing in the names of sons nominally; and we wish that the aforesaid property may be divided into two equal shares by arbitration. We therefore on our behalf nominate *Narain Bhai Seth* resident of *Timurni*, *Sukhdeo Seth* resident of *Harda*, and *Manik Chand Seth*, agent of *Bhajju Shah Deochand Seth* and residing at *Hoshangabad*, as arbitrators; and we hereby agree and bind ourselves in writing that none of us two will object to the taking and accepting of a thing allotted to his share by the arbitrators above named having equally divided the property into two shares of the two brothers."

On the 3rd of September, 1874, the arbitrators made their award, the first part of which is as follows:—

"1. On the 15th May we held a meeting at village *Bhonas* and we allowed both the parties to divide cash, gold, silver, jewels, and precious stones, &c., between them. We adopted this measure with a view that strangers may not obtain a knowledge of such property. Both the brothers accepted and agreed to this arrangement and divided the property mutually. They admitted having done so before Mr. *Nedham*, Assistant Commissioner, and all the arbitrators. Further they took possession of their respective shares.

"2. On the 16th of May the arbitrators proposed as follows regarding the division of the dwelling-house at mouza *Bhonas*. We the arbitrators arranged to divide the dwelling-house into two equal parts, and to draw the share of each brother by lots.

J. C.
1894
MAKUND RAM SUKAL v. SALIQ RAM SUKAL.

They would have then taken the share falling to their respective lots; but *Makund Ram Sukal* refused to draw lots, and stated that if *Tulsi Ram* paid him half price of the house to be fixed by him he can take the house. And if he does not like to do so he, *Makund Ram*, would take the same and pay *Tulsi Ram* half the price. On this the meeting of the arbitrators closed (for that day). On the 17th day of the same month before *Manik Chand* and *Sukhdeo Seth*, *Makund Ram* valued the house at thirty thousand rupees, and stated that if *Tulsi Ram* pays him Rs.15,000, viz. half of that amount (Rs.30,000), he can possess the house with its limits. *Tulsi Ram* accepted the above arrangement and expressed his willingness to pay up Rs.15,000 and to take possession of the house. On this *Makund Ram Sukal* backed out of his agreement and the meeting of the arbitrators closed that day in consequence. Again, on the 30th May we the arbitrators, except *Manik Chand*, went to mouza *Bhonas* to divide the house in question. At this time the property of the description of clothes, utensils, &c., was divided. Regarding the partition of the house both the brothers at our advice agreed to divide the house according to the plan drawn up by us on the same day. This plan shews the boundaries of the house. Both the brothers signed this plan and accepted partition according to it. They attested this partition before Mr. *Nedham* and us the arbitrators in whose presence it took place. They also took possession of their respective shares. Further *Makund Ram* agreed to receive Rs.1000 as damages and cost of building walls, &c., and *Tulsi Ram Sukal* agreed to pay up the sum, and therefore *Makund Ram* is entitled to get this amount. The above partition took place with our unanimous opinion and full consent of both parties. Northern part of the house came into the share of *Tulsi Ram*, while the southern into the share of *Makund Ram*."

The award then proceeds to divide the *Harda* villages. It states that two lists were prepared by *Makund Ram*, one of *Bhonas* circle and the other of *Pokharnee*, the properties in them being found by the arbitrators to be of equal value. *Tulsi Ram* agreed to take *Bhonas* circle, and *Makund Ram*, the award says, accepted *Pokharnee* of his own free will; that the arbitrators signed the lists, and both the brothers took possession of their shares. The

list of the villages in each circle is given in the award. It then states that all the houses situate in *Harda* were divided on the 29th and 30th of June with the unanimous consent of the arbitrators, and a plan drawn in English and Hindi was filed which shewed what houses were allotted to *Tulsi Ram* and what to *Makund Ram*. One named house was to remain in the possession of *Tulsi Ram*, he paying Rs.600 to *Makund Ram*. The award then states that the houses were divided by two lists being made and lots drawn. It then states that on the 2nd of August the arbitrators assembled to divide the remaining undivided property, and that they divided all the property according to the lists filed by *Tulsi Ram* in the manner after stated, but with the exception of grain the remainder of the award does not make a partition of the property, and it has been seen that *Tulsi Ram* in his written statement admitted this. An application to file the award, under the provisions of sect. 327 of the Civil Procedure Code was made by *Tulsi Ram* on the 21st of January, 1875, and was refused on the 29th of March, 1875, on the ground that the award was incomplete and incapable of execution.

In 1877 *Makund Ram* brought his suit for partition. It was first tried by the Deputy Commissioner of *Nimar*, who gave his judgment on the 18th of September, 1878. In it he found that soon after the arbitration commenced, *Makund Ram* shewed by his general behaviour and various overt acts his dissent from nearly all the decisions of the arbitrators as they were given from time to time, and that it was mainly due to his persistent obstructiveness that a full and complete award was not given; but that whether under protest or no he took possession of the share of the landed property that was awarded to him. The decree was that the Plaintiff's claim for partition for such of the family property as was described in the award of the arbitrators should be dismissed, that the debts due to the family before the partition should be divided under the orders of the Court into two equal shares, and that the property described in the Schedules F and G should also be divided into two equal shares.

Makund Ram appealed to the Court of the Additional Commissioner, and the suit was on the 2nd of April, 1879, remanded

J. C.
1894
MAKUND' RAM SUKAL v. SALIQ RAM SUKAL.

by that Court in order that the value of the undivided property might be ascertained in such a manner as might enable the lower Court to divide it equally between the Plaintiff and Defendant. The proceedings on this remand were returned to the Additional Commissioner's Court of the *Nerbudda* Division to which the suit had been transferred, and it appearing that there was a technical objection which invalidated them, the suit was on the 3rd of January, 1880, again remanded. After this there appears to have been great delay on the part of the Deputy Commissioner of *Nimar*, and the suit was by an order of the 19th of April, 1883, transferred to the Court of the Deputy Commissioner of *Hoshangabad*. The record and proceedings with a report of Commissioners of the 16th of October, 1883, having been returned by the Deputy Commissioner to the Commissioner's Court, *Nerbudda* Division, judgment was given on the 1st of May, 1884. In it the Commissioner held that so much of the Plaintiff's pleas in appeal as related to the arbitrators and their award had been disposed of by the Additional Commissioner's judgment of the 2nd of April, 1879, and made a decree upholding so much of the decree of the lower Court of the 18th of September, 1878, as dismissed the Plaintiff's claim for partition of property divided by the award, and modified the rest of that decree by adopting the Commissioner's report of the 16th of October, 1883, and the lists marked 1, 2.

From this decree the Plaintiff appealed to the Judicial Commissioner, and *Tulsi Rám* having died, *Saliq Ram*, his son and heir, was made Respondent. On the 17th of August, 1885, on an objection by the Plaintiff that the judgment of the Additional Commissioner of the 2nd of April, 1879, did not dispose of his objections to the decision of the Deputy Commissioner of *Nimar* of the 18th of September, 1878, in respect of the validity of the partition of property made by the arbitrators, and that the Plaintiff was entitled to have those objections in appeal adjudicated on, the Judicial Commissioner held that the Plaintiff was so entitled, and that it was not sufficient simply to ignore them; and the suit was remanded to the lower Appellate Court to decide the pleas in appeal against the decision of the First Court, declaring that the partitions of property made in 1874 by the

arbitrators or otherwise were valid and not liable to be disturbed. The judgment of the Commissioner on this remand was given on the 22nd of April, 1886, and being a judgment of a First Appellate Court, it is as regards the facts, found final.

It will be convenient here to notice that the objections taken in this appeal by Mr. *Finlay* on behalf of the Plaintiff were that the award was bad, as it did not deal with all the matters submitted, and was uncertain, and that *Makund Ram* objected to go on, and only did so under pressure. The judgment says, "I hold that the Appellant has altogether failed to shew that the reference to arbitration was made under misapprehension, and still less under compulsion. . . . As to compulsion, it is absurd on the face of it, having regard to the Plaintiff's age and position at the time, and to the fact that no one of the local authorities had any conceivable interest in bringing compulsion to bear on either party. . . . The point for determination seems to be what weight is to be attached to the Appellant's own signature of the document whereby he elected the *Pokurni* chuck. On this point the document itself is the best evidence, and I entirely agree in the view urged by Respondent's counsel that this document represents an amicable division, voluntarily and deliberately made by both parties. Some inequality in the net profits of the chucks was apparent on the face of the lists when they were signed, but I must hold that the Plaintiff knew quite well what he was about when he signed them, and that he signed deliberately. . . . As to the cash, gold, and ornaments, I agree with the lower Court that they were amicably divided between the parties at the arbitrators' suggestion and instance. . . . As regards the house at *Bhonas* there is every reason to believe that the division was amicable and complete. As regards the *Harda* houses, there is no evidence of inequality or unfairness in the award."

This judgment is a complete answer to the objection that *Makund Ram* was under pressure and was compelled to agree to the arbitration and to proceed with it. Also it is found as a fact that the parties agreed to and made a division of parts of the property, without any condition that this was not to be final and was to be dependent upon the whole of the property being

J. C.
1894
MAKUND RAM SUKAL v. SALIQ RAM SUKAL.

divided. If the arbitrators had done this by their own authority only, the cases referred to by Mr. *Finlay* might have been applicable, but it was competent to the parties when they were before the arbitrators to agree to the division being made by steps and that each division should be final. It was a convenient plan and it was for their convenience to adopt it. They might waive the condition that a complete partition must be made of the whole of the property. The ground upon which an award which does not dispose of all the matters referred has been held to be invalid appears to be that there is an implied condition that it shall do so. Upon the facts which have been found by the First Appellate Court their Lordships think that the award so far as it makes a division of the property is valid.

A report of Commissioners as to the division of the property not divided by the award having been submitted to the Deputy Commissioner, he on the 6th of July, 1887, submitted the papers to the Court of the Commissioner of the *Nerbudda* Division, the Judge of which made a decree in these terms: "It is ordered that—(1.) The arbitration award dated 3rd September, 1874, is upheld with respect to all property said in that award to have been divided. (2.) That the undivided property will now be divided in accordance with the list appended to the Commissioner's report dated 25th June, 1887, which has been fully accepted except as regards the three villages of *Sonkheri*, *Lakhanpur*, and *Samara*. Those three villages will now be allotted to Plaintiff *Makund Ram*, and Defendant *Saliq Ram* will receive in lieu thereof Rs 24,000."

Saliq Ram appealed to the Judicial Commissioner, one of his grounds being that the Lower Appellate Court ought to have awarded to him a half share of the villages and the rents and profits thereof, inasmuch as they were acquired by the use of joint family funds. And *Makund Ram* filed objections under sect. 561 of the Civil Procedure Code. The facts as to these villages are that one *Khushal Patel* owed a debt of Rs.48,000 to the joint family of *Makund Ram* and *Tulsi Ram*, and that shortly after the award was delivered in 1874 *Makund Ram* by means of a benami transaction took Rs.10,000 in cash and a conveyance in his son's name of the three villages in lieu of the joint debt. It

was not disputed before the Judicial Commissioner that this was the result of the finding of facts in the Commissioner's report. The Judicial Commissioner modified the decree of the Lower Appellate Court so far as it affected the three villages, and some land situate in the town of *Harda*, about which there is no question now, and decreed that the three villages should be divided equally between the parties, and that *Makund Ram* should pay to *Saliq Ram* Rs.5000 being half of the Rs.10,000. Whether this is right is the only remaining question in this appeal. It seems to have been contended that the taking a conveyance in his son's name shews that *Makund Ram* intended to buy the villages for himself and not for the family, but the agreement to refer shews that family property might be in a son's name. *Makund Ram* might as manager of the family property, and honestly, agree in this way of settling the debt of *Khushal*. He would have no authority, and it would be contrary to his duty as manager or as a co-sharer to make use of the debt for a purchase on his own account. It should be presumed in the absence of evidence to the contrary that he did what he might lawfully do, and their Lordships think the Judicial Commissioner has taken the right view of the transaction. They will therefore humbly advise Her Majesty to affirm the decree of the Judicial Commissioner and of the Lower Appellate Court except so far as it is modified by the decree of the Judicial Commissioner and to dismiss this appeal. The Appellant will pay the costs of it.

Solicitors for the Appellant: *T. L. Wilson & Co.*
Solicitors for the Respondent: *Barrow & Rogers.*

J. C.*
1893
Nov. 9, 10, 11.
1894
March 10.

ABDOOL RAZACK . . . . . PLAINTIFF;

AND

AGA MAHOMED JAFFER BINDANEEM . DEFENDANT.

ON APPEAL FROM THE COURT OF THE RECORDER OF RANGOON.

Mahomedan Law—Marriage with Unbeliever—Presumption—Acknowledgment of Legitimacy.

Case in which it was held upon the evidence that an alleged marriage between a Mahomedan and a Buddhist woman was disproved.

Quære, whether Buddhists come under the same category as Jews and Christians, with whom Mahomedans may intermarry.

Semble, in all cases where, according to Mahomedan law, unbelief or difference of creed is a bar to marriage with a true believer, such marriage will be valid if the alien in religion embraces the Mahomedan faith. Profession of such faith, whether with or without conversion, is necessary and sufficient to remove the disability.

The presumption which ought to be made in favour of marriage, where there has been a lengthened cohabitation, is rebutted by shewing that the conduct of the parties is inconsistent with the relation of husband and wife.

The Mahomedan doctrine of legitimacy by acknowledgment does not apply to every case of admission of paternity; an intention to confer the *status* of legitimacy must be proved or presumed.

Ashrufood Dowlah Ahmed Hossein Khan v. *Hyder Hossein Khan* (1) followed.

APPEAL from a decree of the Recorder of Rangoon (Feb. 5, 1892), dismissing the suit of the Appellant against the Respondent, as executor of the will of *Hadjee Hoosain Bindaneem.*

The facts are stated in the judgment of their Lordships.

The Appellant claimed as brother's son to the testator, and therefore, by the law of inheritance, entitled to his estate, after deducting the share of the widow and such legacies as the testator was, by the Shiah law, entitled to give. The name of the testator's brother was *Abdul Hadee.*

* *Present:*—LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, and SIR RICHARD COUCH.

(1) 11 Moore's Ind. Ap. Ca. 113.

The material portion of the Recorder's judgment was as follows:--

"The first point to consider is whether there was a marriage between *Mah Thai* and *Abdul Hadee*. It is not disputed that before there can be a valid marriage between a Mahomedan and a woman who is not a 'Kitabi,' the woman must be converted to Mahomedanism (see Tagore Lect. 1873, p. 305). *Mah Thai's* evidence as to the marriage is, that she was in an inner room, that she heard voices in the outer room, and some one asked her if she loved *Abdul Hadee*, and consented to the marriage? Then she was asked 'Was anything said about religion?' and she replied, 'My husband said something which I did not understand. *Abdul Hadee* said he would marry me according to Kala custom. I agreed.' Then, in cross-examination, she said: 'I said he would have to give dower according to custom among Kalas. I did not understand; but it was said it must be according to Kala custom, and so I said he must give dower according to Kala custom. I know nothing about the Mahomedan religion. I have all my life lived and worshipped as a Burman. While cohabiting with *Abdul Hadee* I worshipped as he did. As a long time has elapsed, I have forgotten. I could repeat after him; but have forgotten now. He repeated his prayers in some Kala language; I don't know what language. I repeated in the language he used; I did not understand the meaning of a single word. . . . I know there is a Mahomedan mosque here. I wasn't allowed to go to it; I had to stop at home. I know that wives of Moguls go to the mosque; I didn't go, because *Abdul Hadee* would not allow me to go. I said I wanted to go; but he wouldn't allow me.' Then, in re-examination, she said that she ceased to be a Buddhist during her cohabitation with *Abdul Hadee* from the time of her marriage; and that, being the wife of a Kala, she followed the Kala religion. This is all the evidence as to conversion, and I do not see how, on such evidence, it can be held that *Mah Thai* was converted to Mahomedanism. It would, it seems to me, be a mere mockery of the Mahomedan religion to say that there was a conversion, when there was not even a semblance of discussion on the subject, when no priest intervened, and when the utmost the alleged convert can say is,

J. C.
1894
ABDOOL RAZACK v. AGA MAHOMED JAFFER BINDANEEM.

that she repeated prayers in a language she did not understand. This alone would be sufficient to shew that no valid marriage could have taken place. But the other evidence goes to shew that *Mah Thai* could not have been married to *Abdul Hadee.*

"I think then that the Plaintiff *Abdul Razack* has not succeeded in proving that his mother, *Mah Thai*, was converted to the Mahomedan religion at the time of the alleged marriage, and that, as she was not a 'Kitabi,' no valid marriage could have taken place between her and *Abdul Hadee*; not only this, but *Mah Thai* admittedly had, before going to live with *Abdul Hadee*, been married according to Burmese law, and the evidence that she was ever divorced rests only on her unsupported statement. However, I do not lay much stress upon this, but go on this ground—that, assuming for the sake of argument that *Mah Thai* did live with *Abdul Hadee* at the time she says she did, and that the Plaintiff is her son by *Abdul Hadee*, yet, that not having been converted to Mohamedanism, she could not have been legally married to *Abdul Hadee.* If I am right in this view, then it follows, according to the decision of the *Allahabad* Court in *Muhammad Allahdad Khan* v. *Muhammad Ismail Khan* (1), that no acknowledgment on the part of the father could legitimatise the offspring of such an union. *Mahmood*, J., points out that, according to Mahomedan law, so far as inheritance from males or through males is concerned, the existence of legitimacy of descent or consanguinity is a condition precedent to the right of inheritance, and that such legitimacy depends upon a valid marriage or connection between the parents of the inheritor. Further, that in no case can an illegitimate child inherit, and that where a marriage is not possible between the parents, acknowledgments cannot make the offspring of the union legitimate. He also points out that the Mahomedan law of acknowledgment of parentage with its legitimating effect, has no reference whatever to cases in which the illegitimacy of the child is proved and established, either by reason of a lawful union between the parents of the child being impossible, as, in my opinion, is the case here, or, by reasons of marriage necessary to render the child legitimate being disproved. Further, that the doctrine

(1) Ind. L. R. 10 Allah. 289.

relates only to cases where either the fact of the marriage itself, or the exact time of its occurrence with reference to the legitimacy of the acknowledged child, is not proved, in the sense of the law, as distinguished from disproved—in other words, that the doctrine only applies to cases of uncertainty as to legitimacy, when acknowledgment has its effect, but that that effect always proceeds upon the assumption of a lawful union between the parents of the acknowledged child.

"This view, if I may say so, appears to me to be clearly right. Otherwise, if the proposition that acknowledgment alone is sufficient to establish legitimacy is correct, these results must necessarily follow: that a Mahomedan may legitimatise the offspring of adulterous or incestuous intercourse, or even a person of whom he could not possibly have been the father—for example, to put an extreme case, a person older than himself. And this result would also follow in the present case. The parents of the Plaintiff, *Abdul Razack*, could not, according to Mahomedan law, contract a legal marriage; the offspring of their intercourse must, therefore, be illegitimate. But *Abdul Hadee* acknowledged the child; therefore he is legitimate.

"In the view, then, that I take of the case, it is unnecessary to consider the evidence as to the acknowledgment and as to the will, for, assuming the whole of it to be true, the Plaintiff, *Abdul Razack*, cannot be the legitimate son of *Abdul Hadee*; so far as he is concerned, the suit must be dismissed with costs."

The Solicitor-General (Sir *John Rigby*), and *Doyne*, for the Appellant, contended that this judgment was erroneous, and that there was no prohibition in Mahomedan law, either Shiah or Sunni, against the marriage of a Mahomedan man with a Buddhist woman who adheres to the religion of her birth. Buddhists are not to be ranked with idolaters, but may be placed in the same category as Christians or Jews. Reference was made to *Baillie's* Digest of Mahomedan Law, pp. 40 and 41, where it is said: "It is not lawful to marry Mujooseeahs (or fire-worshippers), nor idolatresses." "Among the worshippers of idols are included the worshippers of the sun and stars and images which they hold in reverence, and the Mooûtillah, Zunadook, Bataniah, Abahiah,

J. C.
1894
ABDOOL RAZACK v. AGA MAHOMED JAFFER BINDANEEM.

Moobuyyizzoh, and persons of every creed by belief in which one is deemed a Kafir or Infidel." These respective terms are explained in the notes to mean sects who deprive the Deity of all attributes, Sadducees, Assassins named in the Crusades, Antinomians, and a Mussulman sect whose members wear white garments. "All who believe in a heavenly or revealed religion and have a Kitab, or book, that has come down to them, such as the book of Abraham and Seth and the Psalms of David, are Kitabees, and intermarriage with them, or eating of meat slaughtered by them, is lawful." See also *Macnaghten's* Mah. Law, c. 7, sect. 12, which applies to both Sunnis and Shiahs, where it is said: "Christians, Jews, and persons of other religions believing in one God may be espoused by Mahomedans." See also *Hamilton's* Hedaya, bk. 2, ch. 1. "It is unlawful to marry a Majoosee (fire-worshipper) woman, God having said, 'Ye may hold correspondence with the Majoosees the same as with the Kitabees, but ye must not marry their daughters nor partake of their sacrifices.'" "It is unlawful to marry a Pagan woman; according to the words of the Koran, 'Marry not a woman of the Polytheists until she embraces the faith.'"

Assuming that there is such prohibition, and that in consequence the conversion of *Mah Thai* to Mahomedanism at the time of her marriage must be proved, it was contended on the evidence that *Mah Thai* had ostensibly adopted the Mahomedan faith, and that it was unnecessary to go further and shew a genuine conversion. The Recorder was wrong in holding that to be necessary in order to satisfy the Mahomedan law. The Courts cannot investigate or speculate upon the question of sincerity of belief; their duty is confined to ascertaining what was the open profession on the subject; and the evidence proved that *Mah Thai*, at and after her marriage, professed the Mahomedan religion. Assuming the marriage to be either unproved or of doubtful validity, the legitimacy of the Appellant and his consequent right of succession was established by his father's acknowledgments of him as his son. Acknowledgments have the effect of removing illegitimacy and of establishing legitimacy. They would be useless or superfluous if they were of no avail in the absence of marriage, or in the presence of a doubtful or invalid

marriage. Reference was made to *Khajah Hidayut Oollah* v. *Rai Jan Khanum* (1); *Macnaghten's* Mah. Law, p. 61, art. 33; *Mahomed Bauker Hoossain Khan* v. *Shurfoon-nissa Begum* (2); *Ashrufood Dowlah Ahmed Hossein Khan* v. *Hyder Hossein Khan* (3), where it is said that a child really illegitimate by birth becomes legitimated by force of an acknowledgment express or implied, directly proved or presumed. The child of a concubine may become legitimate by treatment as legitimate: *Ranee Khujooroonnissa* v. *Mussamat Roushun Jehan* (4); *Nawab Muhammad Azmut Ali Khan* v. *Mussumat Lalli Begum* (5); *Syed Sadakut Hossein* v. *Syed Mahomed Yusoof* (6); *Muhammad Allahdad Khan* v. *Muhammad Ismail Khan* (7). It was contended that these cases establish that the recognition of a child who is admittedly born of a concubine by a Mahomedan as his son gives him the *status* of a son capable of inheriting as a legitimate son unless certain conditions exist which render the relationship of father and son impossible: see *Baillie's* Imaeea, ed. 1869, ch. 8, p. 289. Reference was also made to *In re Mussamat Bibi Najib-un-nissa* (8), where it is said that the only conditions of a valid acknowledgment are that the ages of the parties admit of the relationship of father and son, and the descent of the son has not been already established from another: see *Shamachurn's* Mah. Law, 1873, p. 121.

Mayne, and *Branson*, for the Respondent, contended that the Recorder was right in holding, upon the evidence, that no actual marriage was proved, nor any intention on the part of the Appellant's parents to contract one. Even if a marriage ceremony had been performed it would not have been valid. There was no proof of an adoption of the Mahomedan religion by *Mah Thai*, or of her having been recognised as a convert, or of her ever having practised or participated in the rites of that religion.

Then, as regards acknowledgments, it was not disputed that if the marriage were doubtful or invalid it could be cured and

(1) 3 Moore's Ind. Ap. Ca. 295.
(2) 8 Moore's Ind. Ap. Ca. 136.
(3) 11 Moore's Ind. Ap. Ca. 94, 107.
(4) Law Rep. 3 Ind. Ap. 291.
(5) Law Rep. 9 Ind. Ap. 18.
(6) Law Rep. 11 Ind. Ap. 31, 36; S. C. Ind. L. R. 10 Calc. 663.
(7) Ind. L. R. 10 Allah. 289, 333.
(8) 4 Beng. L. R. A. C. 55.

J. C.
1894
ABDOOL RAZACK v. AGA MAHOMED JAFFER BINDANEEM.

legitimatising of the children effected by subsequent acknowledgment. But everything depended upon the character of the acknowledgment and the intent with which it was made. Random statements admitting paternity of the child were not sufficient for that purpose. An acknowledgment to be effectual must be made by a father with intent that it should operate on the *status* of his son. If it was verbal, his surrounding and subsequent acts must be looked to in order to ascertain what effect was to be attributed to his acknowledgment. Here there was no evidence of words being used by way of acknowledgment to which that intent could be attributed. Nor was there any proof that the Appellant's father ever treated him as a legitimate son, or shewed by his conduct that he wished to put him on that footing and make him his heir. On the contrary, the evidence was opposed to that view, and was consistent with his admission of paternity to an illegitimate child through a woman alien in religion with whom he had not contracted or intended to contract a marriage. Reference was made to the the judgment of *Mahmood*, J., in *Muhammad Allahdad Khan* v. *Muhammad Ismail Khan* (1), where it is said that acknowledgment always proceeds upon the hypothesis of a lawful marriage, and that a child whose illegitimacy is proved beyond doubt by reason of the marriage of the parents being either disproved or found to be unlawful cannot be legitimated by acknowledgment: *Wilson's* Glossary, p. 215, vo "ikrar"; *Macnaghten's* Mah. Law, p. 298. Reference was made to *Mahomad Bauker Hossein Khan* v. *Shurfoon-nissa Begum* (2); *Khajah Hidayut Oollah* v. *Rai Jan Khanum* (3), and to the reply of the Mahomedan law officers of the Sudder *Dewany Adawlut* to the provincial Judge of *Dacca* given in that case. See also *Ashrufood Oowlah Ahmed Hossein Khan* v. *Hyder Hossein Khan* (4). The acknowledgment of legitimacy should be of such a character as either to raise the presumption that the mother was married to the acknowledger: *Ranee Khujooroonissa* v. *Mussammat Roushan Jehan* (5), or to legitimise the son if there was no marriage: *Nawab Muhammad*

(1) Ind. L. R. 10 Allah. 324.
(2) 8 Moore's Ind. Ap. Ca. 159.
(3) 3 Moore's Ind. Ap. Ca. 295.
(4) 11 Moore's Ind. Ap. Ca. 94.
(5) Law Rep. 3 Ind. Ap. 291, 311.

Azmut Ali Khan v. *Mussumat Lalli Begum* (1); *Syed Sadakut Hossein* v. *Syed Mahomed Yusoof* (2). The acknowledgment must be of a son who could possibly and lawfully be a legitimate son and made with intent to make him so: see Hedaya, vol. 3, bk. 25, c. 3, and *In re Mussamat Bibi Najibunnissa* (3).

The *Solicitor-General* replied, citing *Saiyad Wali Ulla* v. *Miran Saheb* (4), which was the case of a son of a slave girl acknowledged by his father to be entitled to the same share as the son of a lawful wife.

1894
March 10.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN :—

Hadjee Hoosain, who was a member of a Mahomedan family belonging to the Shiah sect and settled in *Calcutta*, traded as a merchant in *Rangoon*, made a fortune, and died there, married but without issue, in February, 1890. He left a will by which he purported to dispose of all his property. *Hadjee Hoosain* had an only brother of the full blood called *Abdul Hadee*, who died before him in March, 1886. He, too, was engaged in business in *Rangoon* for many years, but his career was less prosperous, and he returned to *Calcutta* a poor man some time before his death. The Appellant claims to be the lawful son of *Abdul Hadee* by a Burmese woman, and as such to be the heir or one of the heirs of *Hadjee Hoosain*, and entitled, therefore, to a share in so much of his estate as he could not dispose of by will according to Mahomedan law. For the purpose of the present case it is conceded that the Appellant's claim is well founded, provided he can make out that he either is or is entitled to be treated as the lawful son of *Abdul Hadee*. And the only questions on this appeal are these: (1.) Has it been established that a valid marriage took place between *Abdul Hadee* and the Appellant's mother, *Mah Thai*, who was undoubtedly a Buddhist when she met her alleged husband? (2.) If proof of legitimacy is wanting, is there sufficient evidence of the legitimation of the Appellant by acknowledgment?

(1) Law Rep. 9 Ind. Ap. 18.
(2) Law Rep. 11 Ind. Ap. 31.
(3) 4 Beng. L. R. A. C. 55.
(4) 2 Bomb. H. C. R. 285.

J. C.
1894
ABDOOL RAZACK v. AGA MAHOMED JAFFER BINDANEEM.

The learned Recorder found that there was no marriage, holding upon the evidence that *Mah Thai* was not a convert to Mahomedanism. "It would, it seems to me," he observed, "be a mere mockery of the Mahomedan religion to say that there was a conversion, when there was not even a semblance of discussion on the subject, when no priest intervened, and when the utmost the alleged convert can say is, that she repeated prayers in a language she did not understand." Taking this view, he thought it unnecessary to consider the evidence as to acknowledgment. No acknowledgment in his opinion could confer the status of legitimacy upon the offspring of a Mahomedan and an unconverted Buddhist.

The learned counsel for the Appellant took exception to the proposition upon which the Recorder's ruling seems to be based. It was a mistake, they said, to talk of conversion. No Court can test or gauge the sincerity of religious belief. In all cases where, according to Mahomedan law, unbelief or difference of creed is a bar to marriage with a true believer, it is enough if the alien in religion embraces the Mahomedan faith. Profession with or without conversion is necessary and sufficient to remove the disability.

This criticism seems to be well founded. But the correction does not mend the Appellant's case. There is nothing in the evidence tending to shew that *Mah Thai* made any profession of the Mahomedan faith before or at the time of the ceremony which is said to have constituted marriage. *Mah Thai* was a witness for the Appellant. She said that she knew nothing about the Mahomedan religion; all her life she lived and worshipped as a Burmese. While cohabiting with *Abdul Hadee* she worshipped as he did; she repeated his prayers. But she added that she did not understand the meaning of a single word. In re-examination she said that she ceased to be a Buddhist during her cohabitation with *Abdul Hadee* from the time of her marriage.

The learned counsel for the Appellant then invited their Lordships to embark on a wider inquiry. They proposed to examine and discuss the tenets of Buddhism with the view of shewing that Buddhists come under the same category as Jews

and Christians, with whom undoubtedly Mahomedans may intermarry. But it was obviously impossible for their Lordships to entertain the question in the present case. In the Court below it was common ground that such a marriage would be invalid, and there was therefore no evidence before the Court directed to the point.

In the next place, it was urged that every presumption ought to be made in favour of marriage when there had been a lengthened cohabitation, especially in a case where the alleged marriage took place so long ago that it must be difficult if not impossible to obtain a trustworthy account of what really occurred. There would be much force in this argument—indeed, it would be almost irresistible—if the conduct of the parties were shewn to be compatible with the existence of the relation of husband and wife. In cases like the present conduct is a very good test, and a safer guide than the recollection or imagination of interested or biased witnesses.

Mah Thai's own account of the way in which she was treated may be accepted as a fairly truthful story, considering her relationship to the claimant, and the fact that she is speaking of what occurred many years ago. The alleged marriage took place somewhere about the year 1854. If that date is correct the connection between her and her alleged husband ceased in 1856, though *Abdul Hadee* did not leave *Rangoon* for good until more than twenty years afterwards. The marriage was proposed to her, she says, by a married sister of hers who was living in *Rangoon*, and who sent for her from her native village—a place called *Mangi*, about half a day's journey off. She had already been married once, but that marriage was dissolved by mutual consent. *Abdul Hadee* was brought for her to see. She asked him if he would look after her and cohabit with her for a long time, and he said he would. He came four or five times before the marriage. He said he would invite his male relatives, but he was not going to invite his female relatives. At the marriage some money and a ring were put into her hands as dower; with that part of the ceremony she seems to have been previously acquainted, and to have been careful to insist upon it; and her consent to the union appears to have been given in due form.

J. C.
1894
ABDOOL RAZACK v. AGA MAHOMED JAFFER BINDANEEM.

Then we have a picture of her married life. After the marriage she was not allowed to go out. She never saw any of her husband's female relatives. She did not know why they did not come to see her. She was not allowed to go to the mosque. She knew that wives of Mahomedans go to the mosque. She did not go because *Abdul Hadee* would not allow her. None of the female members of the Mahomedan community visited her, nor did she visit them. She never saw *Hadjee Hoosain* or any of *Abdul Hadee's* male relatives. At the end of about a year and a half, when she was far gone in pregnancy, she went back to her mother's home in *Mangi*. She was confined there of a boy, whom she identifies as the present Appellant. When the child was born she sent a message to *Abdul Hadee* to tell him of the birth. His answer was that he was busy and could not come. He sent, however, money for expenses, and he sent a message to her parents to look after her. On two occasions afterwards he went to *Mangi* to visit her, returning to *Rangoon* in the evening. The first visit was about six months, the second about twelve months, after the birth of the child. On the first occasion *Mah Thai* says she saw *Abdul Hadee* alone, but nothing in particular was said. He wrote on a piece of paper a Mahomedan name for the child. Afterwards, for fear it would be lost, it was copied on a palm leaf. The name was never used. The paper and the palm leaf have disappeared. But *Mah Thai* says the name was *Abdool Razack*, and that name has been reproduced or adopted in connection with this claim. On the second occasion, according to *Mah Thai's* statement, *Abdul Hadee* wanted to take the child to *Rangoon*, and wanted her to go with him. She said she was not well yet and that the child was not old enough. That was the last occasion on which *Mah Thai* saw *Abdul Hadee*. So far as appears she never even heard from him or of him afterwards. He was at that time apparently in prosperous circumstances, but he made no provision for her or for the child, and he left the child to be brought up as an unbeliever without so much as performing the primary rite of his religion. *Mah Thai* was very badly off, but she never applied to her alleged husband for assistance, nor did she make any attempt to see him, though she knew where he lived, and he had, she said, been kind to her

while they cohabited together, and she liked her life with him. At the end of two years, or four years as she says in one place, she married a Burman by whom she had seven children. Then she divorced him, and at the time of the trial she appeared as the wife or partner of a fourth consort.

Abdul Hadee continued to reside in *Rangoon* for a good many years, paying occasional visits to *Calcutta*. After a time he met with reverses and left *Rangoon* altogether. The last years of his life he spent at *Calcutta*, living as a pensioner on the bounty of his brother, *Hadjee Hoosain*.

The child was brought up by *Mah Thai's* parents, who were in humble circumstances. As *Moung Hpay*, which was the name they gave him, he lived till he was about thirty-five, with no higher aims or aspirations than those of an ordinary Burmese peasant. When the heirs of *Hadjee Hoosain* were wanted, he was discovered in the jungle at *Mangi* by some enterprising gentlemen at *Calcutta* who took the matter up as a speculation. They put him forward as the missing heir, and *Moung Hpay* has become an *alias* for *Abdool Razack*. Their interest in the success of the claim is at least a guarantee that no stone has been left unturned to enable the case to be presented in as favourable an aspect as possible.

In the course of the argument Mr. *Wheeler*, the Judicial Clerk of the Privy Council, referred their Lordships to a case decided by the Special Court of *British Burma* in 1875. It is to be found at page 75 of Mr. *Christopher's* Collection of Circular Orders and Judgments, published under the authority of the Judicial Commissioner in 1881. The opinion delivered by the Court throws so much light on the practice relating to mixed marriages in *Burma*, and the position held by the wife and children when there is a lawful marriage, that it will not be out of place to quote a passage from it. After stating as a matter apparently not open to controversy that, in order to constitute a valid marriage between a Mussulman and a Burmese woman, the woman must first apostatize and embrace Islam, the judgment proceeds as follows :—

"In a country like this, where a large number of Mahomedans from other countries have taken up their residence, and in very

J. C.
1894
ABDOOL RAZACK v. AGA MAHOMED JAFFER BINDANERM.

many cases their permanent abode, and when the natives have no race prejudices against alliances with foreigners, and whose religion offers no impediment to such, we find these mixed marriages everywhere existing among them, which have been duly celebrated according to Mahomedan rites; the wife having previously renounced her own religion and embraced that of her husband. Such an alliance is not regarded by either party as one of a temporary character, or in any way partaking of concubinage such as the *liaisons* which at one time prevailed here between Europeans and the women of the country, but as a formal and a binding marriage. It only requires a short experience of this country to know that these marriages are regarded amongst the Mahomedan community as being of as binding a character, and as conferring on the wife as honorable a position in the family as if she had been of Mahomedan descent: for she holds the same position as the husband's other wife does, if he happens to have another. The offspring likewise of these marriages are brought up in the Mahomedan faith, and are acknowledged by their father as his legitimate children, and at his death share in his property as such. The Burmese wife also takes the wife's share, if she is the only one, or divides it with the other or others as the case may be; and these rights both as regards the children and the wife are recognized by our Courts."

If this be a correct description of the position of a Burmese woman lawfully married to a Mahomedan settler in *Rangoon* it certainly would require a very violent presumption in favour of marriage to enable the Court to hold that *Mah Thai* was lawfully wedded to *Abdul Hadee*. It is tolerably obvious that neither *Abdul Hadee* nor *Mah Thai* regarded the ceremony which preceded their cohabitation in the light of a lawful and binding marriage. On this point their Lordships are glad to find themselves entirely in accord with the Court below.

The only question remaining for consideration is the question of acknowledgment, with which the learned Recorder dealt in rather a summary way. The learned counsel for the Respondent did not deny that *Abdul Hadee* might have married *Mah Thai*, as no doubt he might have done if she had embraced Islam, nor

did they contend that the intercourse between *Abdul Hadee* and *Mah Thai* was of such a character as to prevent the possible legitimation of the offspring. Their contention was that there was no acknowledgment in the legal and proper sense of the word, although there may have been an admission of paternity.

The learned counsel for the Appellant cited various texts, which taken apart from the context would seem to shew that any admission of paternity, though made casually and not intended to have a serious effect, would be sufficient to confer the *status* of legitimacy. It is not in their Lordships' opinion necessary to examine these ancient authorities, or to inquire how far they are applicable to a state of society very different from that which existed at the time when they were promulgated. Their Lordships are bound by the decision of this Board, which is clear upon the point. The question arose in the case of *Ashrufood Dowlah Ahmed Hossein Khan* v. *Hyder Hossein Khan.* (1) There it was contended that the claimant, who was defendant in the suit and respondent on the appeal, had been acknowledged by his putative father. The fact of acknowledgment was denied by the appellant. And a deed of repudiation was set up, in which the father expressly repudiated the claimant as his son. An issue was framed in these terms: "Has the deed of repudiation the effect of cancelling previous acknowledgment of defendant's legitimacy, if such were made?" In the course of their judgment (p. 104) their Lordships comment upon that issue. It was, they said, "very correctly framed. It substitutes for the ambiguous word 'sonship,' which might include an illegitimate son, the word 'legitimacy,' and uses the word 'acknowledgment' in its legal sense, under the Mahomedan law, of acknowledgment of antecedent right established by the acknowledgment on the acknowledger, that is, in the sense of a recognition, not simply of sonship, but of legitimacy as a son." It is clear that it is in that sense that the term "acknowledgment" is used in a later passage of the judgment which has often been cited, where their Lordships say, "a child born out of wedlock is illegitimate; if acknowledged, he acquires the *status* of legitimacy. When, therefore, a child really illegitimate by

(1) 11 Moore's Ind. Ap. Ca. 113.

J. C.
1894
ABDOOL RAZACK v. ACA MAHOMED JAFFER BINDANKEM.

birth becomes legitimated, it is by force of an acknowledgment expressed or implied, directly proved or presumed."

It cannot be contended that there was any acknowledgment of legitimacy in the present case. The so-called acknowledgment, even if the evidence on the part of the Appellant is accepted as true in every particular, comes to nothing more than an admission of paternity which was not intended to have the serious effect of conferring the *status* of legitimacy. A witness is produced who says he accompanied *Abdul Hadee* on his second visit to *Mangi*, and that *Abdul Hadee* told him that he was going to see his son. And there is some other evidence to the like effect. Then there is some evidence that *Abdul Hadee*, though he had no property, left a will, bequeathing everything to his brother *Hadjee Hoosain*, in which he mentioned that he had offspring in *Burma*. According to one witness he named the offspring as "*Abdool Razack*," and expressed a wish that his brother should give him "something." The will, it seems, was sent to *Hadjee Hoosain*, but it is not forthcoming, nor was it acted upon. Assuming, however, every word that is said about it to be perfectly true, the evidence falls very far short of such an acknowledgment as would confer the *status* of legitimacy upon an illegitimate child.

Their Lordships therefore in the result agree with the learned Recorder in thinking that the Appellant's claim fails, and they will humbly advise Her Majesty that the appeal must be dismissed with costs.

Solicitors for Appellant: *Lattey & Hart.*
Solicitors for Respondent: *Bramah & White.*

PONNAMBALA TAMBIRAN . . . . APPELLANT;

AND

SIVAGNANA DESIKA GNANA SAMBHANDA PANNARA SANNADHI AND OTHERS . . . . . RESPONDENTS.

J. C.
1894
March 1, 2; *April* 28.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Construction of Decree—Succession to the Headship of a Mutt—Nomination—Appointment—Act XIV. of 1882, s. 244.

Where a Plaintiff had been declared by decree of the High Court entitled as the head of his Adhinam "to see that a competent Tambiran was appointed as the head of a specified mutt" and the Court below had been directed to appoint on the Plaintiff's nomination if it saw no objection as to fitness otherwise to appoint on its own selection; and the Plaintiff in an execution proceeding nominated the Appellant:—

Held, that the Respondent who had succeeded to the Plaintiff's headship and decree was not entitled to withdraw his nomination; but that the Appellant was entitled to a decision of the Court as to his fitness, and that the High Court was wrong upon the evidence in overruling the lower Court's sanction of the nomination:

Held, further, that the question raised arose between the parties to the suit, and related to the execution of the decree within the meaning of Act XIV. of 1882, s. 244.

APPEAL from an order of the High Court (Feb. 24, 1890), setting aside an order of the Subordinate Judge of *Kumbakonum* (Oct. 7, 1889), made in certain execution proceedings.

In the village of *Dharmapuram* in Southern *India* is an Adhinam or seat of the chief ascetic of a religious association. At the date of the suit, in which this appeal arose, its Adhinam was a person of the name of *Gnana Sambandha Pandara Sannadhi*, the two last words of such name representing his title as head of the Adhinam. To Adhinams of this character various mutts or places for the residence of ascetics or hermits are attached. Such mutts were originally started by pious Hindoos, and in process of time these mutts got endowments of their own,

* *Present*:—LORD MACNAGHTEN, SIR RICHARD COUCH, and the HON. GEORGE DENMAN.

J. C.
1894
PONNAMBALA TAMBIRAN v. SIVAGNANA DESIKA GNANA SAMBHANDA PANNARA SANNADHI

and either got brought under the control of an Adhinam or affiliated themselves to an Adhinam, or sometimes a prosperous mutt developed into an Adhinam in course of time.

A Tambiran of the *Dharmapuram* Adhinam about 300 years ago established a mutt at *Benares*, which was always presided over by Tambirans from the *Dharmapuram* Adhinam. In or about the year 1720 the Tambiran, who was the head of the *Benares* Mutt, established a mutt at *Tiruppanandal* in Southern *India*, and it is the right to the managership of this mutt which was the subject of this appeal.

The last lawful head of the *Tiruppanandal* Mutt was *Ramalinga* Tambiran. He died in September, 1880, and left a will appointing one *Kumarasami* Tambiran, one of his own disciples, the managing Tambiran of his mutt. This appointment was objected to by *Gnana Sambandha*, the then head of the *Dharmapuram* Adhinam, who claimed the right to nominate a Tambiran of his Adhinam to the headship of *Tiruppanandal* Mutt. To enforce this right he filed on the 15th of March, 1881, his plaint in the original suit, out of which this appeal has arisen, against *Kumarasami*. The decree of the High Court on the 23rd of October, 1888, declared *inter alia* that the Plaintiff was entitled to a declaration, that the appointment of *Kumarasami* by *Ramalinga* as his successor was illegal, and should be set aside, and it further declared that the Plaintiff was entitled, as the head of the *Dharmapuram* Adhinam, to see that a competent *Dharmapuram* Tambiran was appointed as the head of the mutt at *Tiruppanandal*, and it ordered that the Subordinate Judge of *Kumbakonum* should direct the Plaintiff (the head of the *Dharmapuram* Adhinam) to name a Tambiran from among the Tambirans of his Adhinam, competent to discharge the duties of the managing Tambiran of the mutt at *Tiruppanandal*, and that if the Subordinate Judge saw no objection to the fitness of the person so named for the said office, he was to appoint him as such managing Tambiran; but that in case the Subordinate Judge should object to the person so named by the Plaintiff, the Subordinate Judge was to appoint a competent Tambiran of the *Dharmapuram* Adhinam as managing Tambiran of the mutt at *Tiruppanandal*, and should direct the Plaintiff to duly invest

him, and to certify such investiture, and that upon such investiture being duly certified the Subordinate Judge should put the person so appointed and invested in possession of the said *Tiruppanandal* Mutt and its endowments.

Kumarasami died, and was succeeded by the second Respondent; subsequently the Plaintiff died, and was succeeded by the first Respondent after having nominated the Appellant in accordance with the decree. The first Respondent petitioned against the fitness of the Appellant, praying to be allowed to withdraw that nomination and substitute the third Respondent in his place.

On the 16th of March, 1889, the Subordinate Judge held that the power to nominate once exercised was exhausted, and refused the substitution proposed. On the 7th of October, 1889, his successor found that there was no objection to the nomination of the Appellant, and accordingly confirmed it.

The High Court in appeal held that the Subordinate Judge was wrong in holding that a nomination once made could not be withdrawn for good cause, their view being that until the Subordinate Judge had acted upon such nomination, it was open to the nominator or his representative to withdraw such nomination and make a fresh nomination if there was any valid cause; that although upon the evidence there might not have been enough to justify the removal from office of the Appellant if he had been duly inducted into office and put in possession of the property and dignities of the said office, that still in their opinion there was enough to shew his disqualification for such office, there being matters proved against him which he ought to have explained, but which he had not explained satisfactorily.

They, therefore, set aside the Subordinate Judge's appointment of the Appellant, and directed him to inquire whether there was any objection to the appointment of the third Respondent, and if he was also open to objection to proceed to appoint a competent Tambiran of *Dharmapuram* to the management of the mutt at *Tiruppanandal.*

Mayne, for the Appellant.

J. C.
1894

PONNAMBALA TAMBIRAN v. SIVAGNANA DESIKA GNANA SAMBHANDA PANNARA SANNADHI.

The Solicitor-General (Sir *John Rigby*), and *Lindley*, for the first and third Respondents:—

A preliminary objection was taken by the Solicitor-General to the hearing of the appeal. The High Court had refused to admit it on the ground that the Appellant was not a party to the original suit, nor to the decree, nor to the appeal, and did not represent any such party: see *Ragava* v. *Rajaratnam* (1). Consequently he was not entitled to have leave to appeal granted to him under c. 45 of the Code of Civil Procedure. Moreover, the order of the High Court of the 24th of February, 1890, was not a decree or final decree within the meaning of sect. 595 of that Code. If any legal right of the Appellant had been infringed by the order, his remedy was by a separate suit to establish such right, and not by appeal in a proceeding in which he had no *locus standi*. [Their Lordships overruled this objection, reserving their reasons.]

Mayne, for the Appellant, contended that the first Respondent had no power under the decree of cancelling or withdrawing the nomination which had been made by his predecessor. The Appellant's nomination had been duly made, he had been selected from the Tambirans of the Adhinam by the man who had been judicially declared entitled to make the selection. The result of the nomination was to vest in him an inchoate right to the appointment, or rather a complete right subject to be defeated in one event, viz., by a judicial declaration of his unfitness. As a nominated successor he has a vested right to succeed, defeasible in one special authorized manner and not otherwise. Reference was made to *Neelkristo Deb Burmono* v. *Beerchunder Thakoor* (2). The nomination in such a case as this is the actual appointment subject to a sanction which does not imply any right of selection, but which must proceed on judicial grounds, and cannot be withheld capriciously. The nomination of the Appellant was valid, and the nominee had become head of the mutt, unless there were valid reasons for holding that he was an unfit person. It was contended on the evidence that the finding to that effect by the High Court was erroneous.

(1) Ind. L. R. 14 Madras, 57. (2) 12 Moore's Ind. Ap. Ca. 523.

The Solicitor-General (Sir *John Rigby*), and *Lindley*, for the first and third Respondents, contended that the right of nomination had passed to the first Respondent. The Plaintiff had died before his nomination had been sanctioned by the Court, without which sanction it was of no effect. Both under the general law and under the High Court's decree of the 23rd of October, 1888, when the first Respondent became head of the Adhinam, he had a right to nominate the managing Tambiran of the mutt. There was a *locus penitentiæ* with regard to any nomination until it was sanctioned. The Appellant had not accepted the office, and could not do so till his nomination had been sanctioned. If the original Plaintiff had lived he could have withdrawn the nomination, if any valid objection had been made to it, or if his own opinion of the Appellant's fitness had changed. The Plaintiff's successor in office had the same right. Upon the evidence it was contended that the High Court was right in holding that there were good grounds for disallowing the Appellant's claim to be appointed, and in refusing to sanction the Plaintiff's nomination. The lower Court had subsequently to the High Court's order appealed from found that the third Respondent was a fit person to be appointed, and it was contended that under the decree he had obtained a good title to the office.

Mayne, replied.

1894
April 28.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

This appeal arises out of proceedings in the execution of a decree of the High Court at *Madras*, made on the 23rd of October, 1888, in an appeal in which *Gnana Sambandha*, the Plaintiff in the suit, was Appellant, and the second Respondent *Visvalinga* Tambiran, the representative of *Kumarasami* Tambiran, the original Defendant in the suit, was Respondent. The suit related to two mutts (temples), one situated at *Tiruppanandal* and the other at *Benares*, and was brought by the Plaintiff as the representative for the time being of a religious institution called the Adhinam at *Dharmapuram* in the district of *Tanjore*. The

J. C.
1894
PONNAMBALA TAMBIRAN v. SIVAGNANA DESIKA GNANA SAMBHANDA PANNARA SANNADHI.

Plaintiff's case was that the properties in suit were the endowments founded in support of the mutts and various charities at *Benares* and other places, in the charge and under the management of the Tambirans or representatives of the mutt called the *Benares* Mutt at *Tiruppanandal* in the same district; that the last lawful manager of this mutt was one *Ramalingam* Tambiran, and upon his death a dispute arose in regard to the right of succession to the management. The plaint prayed for a declaration that the mutts at *Tiruppanandal* and *Benares* were subject to the control of the Plaintiff and his successors at *Dharmapuram*; that they were entitled to appoint and send Tambirans to manage them; that the Defendant's succession was unlawful as he was not a Tambiran attached to the Adhinam at *Dharmapuram*, and was not appointed by the Plaintiff; and that the will executed by *Ramalingam* Tambiran in his favour had no legal force. The High Court decreed that the Appellant's claim that the properties at *Tiruppanandal* and *Benares* belonged to the Adhinam at *Dharmapuram* and to the possession of those properties should be dismissed; and that his claim to a declaration of his right to appoint Tambirans to management at *Tiruppanandal* and *Benares*, and to a direction that possession of the said properties should be transferred to a Tambiran whom he might appoint, should also be dismissed. In other respects the decree of the Lower Court was reversed, and it was declared that the appointment of *Kumarasami* the original Defendant by *Ramalingam* as his junior and successor, and the will in favour of *Kumarasami*, were illegal, and they were set aside so far as they related to the mutts at *Tiruppanandal* and *Benares* and other subordinate mutts and their endowments. It was also declared that the Appellant was entitled as the head of the *Dharmapuram* Mutt to see that a competent *Dharmapuram* Tambiran was appointed as the head of the mutt at *Tiruppanandal*; that the Subordinate Judge of *Kumbakonum*, in order to fill up the then vacant office of Tambiran of the *Tiruppanandal* Mutt, should direct the Appellant, who was the Plaintiff in the suit, to name a Tambiran from among the Tambirans of his Adhinam competent to discharge the duties of the managing Tambiran of the *Benares* (*Kasi*) Mutt at *Tiruppanandal*; that if the Subordinate Judge saw no objec-

tion to the fitness of the person so named for the office aforesaid, he should appoint him as such managing Tambiran; but in case the Subordinate Judge should object to the person so named he should appoint a competent person of the *Dharmapuram* Adhinam as such managing Tambiran, and should thereupon direct the Appellant to invest him as usual and certify it; and that upon the investiture being certified, the Subordinate Judge was to place the person so appointed and invested in possession of the mutt, &c.

On the 21st of January, 1889, the Plaintiff in the suit, and Appellant in the High Court, applied to the Subordinate Judge for execution of the decree by a warrant for realisation of the costs awarded by it, and that further proceedings might be taken regarding the appointment of a Tambiran to the then vacant place in the Kasi (*Benares*) Mutt at *Tiruppanandal*, in accordance with the decree. Thereupon, on the 25th of January, the Subordinate Judge made an order directing the Petitioner to name a Tambiran from among the Tambirans of his Adhinam competent to discharge the duties, ten days being given for that purpose.

On the 11th of February, 1889, the Plaintiff presented a petition to the Subordinate Judge, praying that inasmuch as *Ponnambala* Tambiran, one of the Tambirans of his Adhinam, was a fit man for the vacant place, was competent to discharge the affairs thereof with efficiency, and was one of good character from among the Tambirans of his Adhinam, the Court would be pleased to appoint him to the vacant office. Upon this an order was made in these terms:—"The Court has no means of testing the fitness of the Tambiran named except by inviting the opinion of the public about it. Therefore a notice will be put up at the Court-house calling upon the public interested in the well-being of the mutt at *Tiruppanandal* to give its opinion about the Tambiran named on Saturday, the 2nd of March, 1889." Accordingly a notice to that effect was, on the 15th of February, affixed in a conspicuous part of the Court-house. It may be doubted whether this was either a necessary or a wise proceeding on the part of the Subordinate Judge, leading, as it was sure to do, to agitation among the supporters of a rival candidate, and subjecting the

J. C.
1894

PONNAMBALA TAMBIRAN v. SIVAGNANA DESIKA GNANA SAMBHANDA PANNARA SANNADHI.

appointment to something resembling popular election, which does not appear to be intended by the decree.

In the case for the Appellant it is stated that, in reply to this notice, a great number of petitions were forwarded to the Court, many of them expressing approval of the nomination of *Ponnambala*, others suggesting the names of other Tambirans as being in the opinion of the writers more suitable for the post. Of the latter class the majority were in favour of *Karbar Saminadha* Tambiran, at that time manager of the *Dharmapuram* Adhinam. Of the petitions opposed to the nomination seventy-four stated the preference of the Petitioners for some other nominee, but contained no allegation to the prejudice of *Ponnambala*; sixty-one contained a general statement of unfitness, but with no reason for it, and eleven charged him with misconduct. The accuracy of this statement in the Appellant's case was not disputed by the Respondents' counsel.

On the 18th of February, 1889, the Plaintiff in the suit and Appellant in the High Court, died, and was succeeded as the head of the *Dharmapuram* Adhinam by the first Respondent in the present appeal, who, on the 28th of February, petitioned the Court to admit him in the place of the deceased, and to take further proceedings. On the 15th of March he was ordered to be made the representative of the deceased Plaintiff. On the same day he presented a petition to the Court stating that *Ponnambala* was unfit to manage the properties of the *Benares* Mutt at *Tiruppanandal*, and that contrary to the decision he was a Tambiran who received kashayam (a ceremony of initiation) from the *Madura* Adhinam, and praying that the Court would permit him to withdraw the petition submitted to the Court by the former Pandaran *Sannadhi* nominating *Ponnambala* Tambiran, and to appoint *Karbar Saminadha* Tambiran to the office. On the 16th of March the petition, and also one for the realisation of the costs, came on for hearing, the representative of the Defendant in the suit and *Ponnambala* being described as counter Petitioners in the title of the judgment. The former did not appear. *Ponnambala* appeared by two Vakils, and in the judgment it is said that on his behalf it was contended *inter alia* that the power of nomination could be exercised only once, that

it was exercised by the late Pandara *Sannadhi*, and that under the decree of the High Court the representative of the Appellant had no power to make a fresh nomination unless directed by the Court. The Petitioner's pleader contended that there was power to withdraw the nomination and to make a fresh nomination. The Subordinate Judge in his judgment, after saying it was suggested that matters would be greatly facilitated by his deciding first of all the question about the power of nomination, gave his reasons for holding that the power of nomination could be exercised only once.

Evidence was then gone into, the new head of the *Dharmapuram* Adhinam examining witnesses, including himself, to prove the charges against *Ponnambala*, and *Ponnambala* examining witnesses in answer, also including himself. The opponents of *Ponnambala* objected to his appointment on the grounds—(1.) That he was not ordained by the *Dharmapuram* Adhinam, and was not a Tambiran of the *Dharmapuram* Mutt, but that he came from and belonged to the Adhinam at *Madura*. (2.) That he proved himself unequal to discharge the less onerous and comparatively trifling duties of the *Dharmapuram* Mutt, to which he had been appointed within the last seven or eight years. Upon the latter charge, evidence was allowed to be given that he misconducted himself while so employed, and committed acts of malversation and breach of trust, and misappropriated money and things belonging to the mutt and its charities. The Subordinate Judge (the successor of the one who held that the nomination could not be withdrawn, and who had taken the depositions of all the Plaintiff's witnesses upon the second question, except one who was examined before a commissioner), having taken the evidence of *Ponnambala* and his witnesses, held that there was no objection to his nomination, and confirmed it, and directed him to be invested and the investiture to be certified within two months from the date of his decree, and ordered that upon such investiture being certified, *Ponnambala* Tambiran should be put in possession of the *Benares* Mutt at *Tiruppanandal*, and the properties forming its endowments, and the endowments of the charities attached to it.

The new head of the *Dharmapuram* Adhinam, who was allowed

J. C.
1894
PONNAMBALA TAMBIRAN v. SIVAGNANA DESIKA GNANA SAMBHANDA PANNARA SANNADHI.

to be the Plaintiff, appealed to the High Court, which ordered that the order of the Lower Court appointing *Ponnambala* Tambiran as the head of the mutt should be set aside, and the petitions be remanded, and that the Judge should proceed to inquire if there was any objection to the appointment of the person nominated by the then Plaintiff, and appoint him if there was no objection, and if his appointment was found on inquiry to be open to objection, to proceed to appoint a competent Tambiran to *Tiruppanandal*. The present appeal is brought by *Ponnambala* from that order.

The Solicitor-General, who appeared for the first and third Respondents, objected to the appeal being heard on the ground that sect. 244 of the Civil Procedure Code (Act XIV. of 1882) was applicable, and that *Ponnambala* ought to have brought a separate suit. By an Order of Her Majesty in Council, dated the 9th of May, 1891, special leave to appeal against the order of the High Court was given, but the Respondents were to be at liberty to raise any questions regarding the competency of the appeal at the hearing thereof. Sect. 244 enacts that questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge, or satisfaction of the decree, shall be determined by order of the Court executing the decree, and not by separate suit. It would be a sufficient answer to this objection that it was not taken before the Subordinate Judge when he allowed *Ponnambala* to become a party to the proceedings and appear by a Vakil at the hearing, at which it was decided that the nomination could not be withdrawn. Nor was the objection taken in the grounds of appeal to the High Court. It is too late now to take it. But their Lordships cannot see what suit could be brought by *Ponnambala*. The nomination could not give a right to bring a suit, and whilst the decree of the High Court stood he had no title upon which to bring one to set aside that decree if such a kind of suit were maintainable. If he is not allowed to appeal against the order of the High Court he will be without any mode of relief. And the High Court say in their judgment that they considered he was a necessary party to the proceeding as the person to whose appointment the Appellant before them objected. Sect. 244

appears to be intended to prohibit a separate suit in cases where one might be brought, and to enable the question to be determined in the execution proceeding. It is not applicable to such a case as this.

The first question for consideration is: Could the new head of the *Dharmapuram* Adhinam withdraw the nomination of his predecessor and make a new nomination? The answer to that depends upon the meaning of the decree. The declaration in it that the head of the *Dharmapuram* Adhinam was entitled to see that a competent *Dharmapuram* Tambiran was appointed as the head of the mutt at *Tiruppanandal* was relied on. What follows this declaration shews that it does not give him power to appoint. He is to nominate, and it is his duty to nominate a competent person. If he afterwards discovers any ground of unfitness in the person nominated he should inform the Subordinate Judge who is to decide whether there is any objection to the fitness of the person. The appointment is to be made only by the Subordinate Judge. He is to direct the head of the Adhinam to name a Tambiran, and when that is done is to decide upon his fitness. The person nominated has a right to have the decision of the Subordinate Judge, and would be deprived of it by the nomination being withdrawn and a new nomination being made. The petition before referred to asked that the Petitioner might be permitted to withdraw the nomination of *Ponnambala* and to nominate *Saminadha* Tambiran. This was not granted by the Subordinate Judge, but the High Court, if their Lordships rightly understand its judgment, appears to have held that until the Subordinate Judge acted upon the nomination there was a *locus penitentiæ*, and he was entitled to withdraw it if in his opinion there was any valid objection to it, and therefore the Petitioner might withdraw it if there was any valid objection to it. Their Lordships do not concur in this construction of the decree.

There remain then two questions for determination: 1. Was *Ponnambala* a Tambiran of the *Dharmapuram* Mutt? 2. Was he unfit to be appointed Tambiran of the mutt at *Tiruppanandal*? The first witness was the then head of the *Dharmapuram* Adhinam, who petitioned to be allowed to withdraw the

J. C.
1894
PONNAMBALA TAMBIRAN v. SIVAGNANA DESIKA GNANA SAMBHANDA PANNARA SANNADHI.

nomination of *Ponnambala*. He said that *Ponnambala* was removed from the Odakkam (an office) in the *Dharmapuram* Mutt for some wrongful acts committed by him in respect to cash and paddy. He used to visit *Dharmapuram* occasionally from *Trichinopoly*, where he held an office, and finding *Ponnambala* unemployed he asked him the reason. *Ponnambala* said he had committed some faults in respect of cash and paddy, and that the Pandara *Sannadhi* had removed him. The witness spoke to the Pandara *Sannadhi* himself, who said he had removed *Ponnambala* for wrongful acts committed by him in respect to cash and paddy. In answer to the Court, the witness said that the late Pandara *Sannadhi* did not think *Ponnambala* fit for the office of Tambiran of *Tiruppanandal*, and that he nominated him in consequence of the persuasion of persons whose names he gave, because it was thought he would act up to their wishes. In cross-examination he said that he had been to the *Madura* Adhinam, and saw *Ponnambala* there, and therefore he stated in his petition that *Ponnambala* had received his kashayam (the visible symbol of initiation) in the *Madura* Adhinam. He said there was some difference in the mode of dress adopted by the Tambirans of the *Madura* Adhinam and the Tambirans of the *Dharmapuram* Adhinam, and that *Ponnambala* had adopted the *Dharmapuram* style for ten or eleven years, ever since he came to the *Dharmapuram* Adhinam, and that the *Dharmapuram* Adhinam had a mutt at *Madura*. As to the faults committed in the Odakkam he said there was a general talk, that he had not up to that time inquired about particulars, and did not know what faults *Ponnambala* had committed in respect to cash and paddy, and there was no record to shew that *Ponnambala* had committed faults in the Odakkam, and that he had been removed. The witness said he and three other Tambirans protested against the nomination; they told the Pandara *Sannadhi* that *Ponnambala* belonged to the *Madura* Adhinam; that it was not proper to appoint him to a big mutt like *Tiruppanandal*; and that the *Karbar* Tambiran should be appointed. This is the Tambiran who was nominated by the witness in his petition for withdrawal of the nomination of *Ponnambala*. Further on he said there were complaints about the management of Rajan

Katlai some months before the Pandara *Sannadhi's* death; that *Ponnambala* had made large remissions of rent, and that he did not take any notice of the accounts shewing less cultivation; there were no records about them. Why, it may be asked, did not the witness bring these complaints before the deceased Pandara *Sannadhi* when he made the protest? He appears to have made in his petition to the Court a grave charge of unfitness against *Ponnambala* upon vague and general statements, of which he had not at that time any evidence, and to have been influenced by a desire to have the other candidate appointed. The next witness, *Venkatarama Aiyar* had been an agent in the *Dharmapuram* Mutt for forty-seven or forty-eight years, and had known *Ponnambala* for ten or eleven years. He said he was a Tambiran of the *Madura* Adhinam. He said, "I asked him, and he said he had come from the *Madura* Adhinam. I have moved with him closely these ten or eleven years. He is not fit to manage the estate of the *Tiruppanandal* Mutt as the Tambiran thereof." He went on to say that *Ponnambala* was dismissed from the Odakkam for acts of malversation as regards paddy rice and cloths, and was unemployed for two or two and a half years; that he was afterwards sent for five or six months by the Pandara *Sannadhi* to assist the *Katlai* Tambiran at *Tirubhuvanam* who was ill, and was afterwards sent to *Tiruvarur*, where he had been for the last two years, and there had been frequent complaints that he did not manage the lands properly. He said, "The complaints existed from the time of the late Pandara *Sannadhi*." Their Lordships think that if there had been any malversation in the Odakkam which rendered *Ponnambala* unfit for employment he would not have been appointed to *Tiruvarur* or allowed to remain there for two years. In cross-examination the witness said, "From what *Ponnambala* Tambiran and other Tambirans told me, I said he belonged to the *Madura* Adhinam." As to the faults, as the witness called them, in the Odakkam, he said the Pandara *Sannadhi* held an inquiry, and called on *Ponnambala* for an explanation, and asked the witness and other agents to look into the accounts. They did so, and reported the matter to the Pandara *Sannadhi*, who did not press it. The next witness is *Dharmalinga* Pillai, who said he had

J. C.
1894
PONNAMBALA TAMBIRAN v. SIVAGNANA DESIKA GNANA SAMBHANDA PANNARA SANNADHI.

been in the service of the mutt for twenty-two years. In considering the value of the evidence of agents or servants of the mutt it is to be observed that they were deposing in support of the case of the present head of it. This witness said *Ponnambala* was a Tambiran of the *Madura* Adhinam; it did not appear that he received Mantra Kashayam in the *Dharmapuram* Mutt. In cross-examination he said that when *Ponnambala* first arrived at *Dharmapuram* he was not dressed in the Dharmapuram style, and he asked him to what Adhinam he belonged, and he said to the *Madura* Adhinam. But the witness said, "When he changed his style of dress I did not ask him about it. . . . I do not know the reason for his changing his style of dress. It is not usual for one to remain at the giving of Mantra Kashayam or Upadesam. Tambirans who received Mantra Kashayam used to tell me about it. As *Ponnambala* did not tell me about it, I thought he did not receive it at *Dharmapuram*." He said he was present when the Pandara *Sannadhi* inquired about the cash, cloths, and paddy missing, and from faults discovered against him in the Odakkam, and from complaints against him from *Tiruvarur*, he stated he was not fit to be appointed to *Tirupanandal*.

The next witness was *Tirumalai* Pillai, also an agent in the *Dharmapuram* Mutt. He said *Ponnambala* committed some faults in the Odakkam, and the Pandara *Sannadhi* dismissed him; that he knew both the facts personally. This is all he said as to that charge. As to the *Rajan* Katlai he said two Brahmin agents attached to it represented to the Pandara *Sannadhi* "that *Ponnambala* had sold paddy without orders, and that he had made remissions in lease. They said that paddy was sold, and the proceeds were not brought to account, and that the yield was good, and there was no ground for remission at all. Pandara *Sannadhi* sent for *Ponnambala*. The agents said that the sale proceeds were carried towards the payment of debts due to one *Somasundara*. This was what the accounts stated. They said *Ponnambala* said he had not committed any faults and that the accounts would support him." The accounts were not produced as they should have been. Without them this evidence is of no value. The next witness is *Ramaswamy Aiyan*,

who was employed in the *Rajan* Katlai at *Tiruvarur* as the *Attavani* accountant. His charges against *Ponnambala* were that he expended money without Uthara chits (which are orders on the Shroff for disbursements of moneys, prepared by the witness and signed by the Tambiran); that when there were not Uthara chits Tambiran himself spent the money and the Shroff had no knowledge of it. He said *Ponnambala* wrote in the accounts some fictitious debts, and appropriated the sums to his own use; that the debts were written in the names of *Somasundara Chetti* and *Tyagu Chetti.* The witness also said that a sum of 100 and odd rupees, the produce of a sale, was not brought into account, and there was a remission to a lessee; that the Pandara *Sannadhi* directed the amount remitted to be collected, and as regards the matters not brought into account he said he would send final orders, but no such orders were received. Without the accounts the truthfulness of this witness could not be tested. He said he got Rs.6 a month in the *Rajan* Katlai and "did not mention to any one else the said matters up to now," which is improbable if they were of any importance. The next witness is *Ramaswamy Aiyar*, one of the Brahmims who were said by a former witness to have made a complaint. He does not give any material evidence, and appears to have had a dispute with *Ponnambala* about his pay.

The evidence of the remaining witnesses for the Plaintiff—with one exception, *Vidilinga* Tambiran, whose evidence need not be noticed—relates to the question whether *Ponnambala* was a Tambiran of *Dharmapuram*, and it will be better now to notice his witnesses in answer to the charges against him. He was first examined. He said that he was a native of *Kallianipuram*, and received Mantra Kashayam in *Sivasilam.* He denied that while he was doing duty as *Odakkam* Tambiran he was removed for any fault, or that the Pandara *Sannadhi* held an inquiry as to his having appropriated to his own use paddy, cloth, and cash; or that he was tried at *Dharmapuram* for any fault committed at *Tiruvarur.* He said in cross-examination that "orders were received that it was wrong to have granted a lease to the Maniagar of the village of *Sakkramangalam* . . . that it was wrong not to have collected 150 kalams of paddy out of the

J. C.
1894
PONNAMBALA TAMBIRAN v. SIVAGNANA DESIKA GNANA SAMBHANDA PANNARA SANNADHI.

lease amount. The order to the effect that it was wrong to have granted remission of fifty kalams of paddy was received subsequent to the explanation sent by me to the Pandara *Sannadhi.*" He also admitted that Uthara chits were not properly kept by him, and that they should be properly kept up. In the course of a long cross-examination he repeated that he was not dismissed from the Odakkam, and was not found fault with for stealing money and paddy, or punished for it. This examination was taken on the 11th of April, 1888, and it appears from the Judge's diary that owing to his illness, and the Court being closed for recess, the further hearing was postponed till the 13th of September. On the 18th of September the witness was re-called, and examined by the Plaintiff's pleader, when he said that he never made expense without issuing Uthara chits. He was then examined as to sums amounting to Rs.200, credited in the accounts of *Rajan* Katlai under the name of *Somasundari Chetti.* He admitted that there was a man of that name at *Dharmapuram,* a cook in the mutt there, who was serving under him for a month or two, but he said he did not know who the *Somasundari Chetti* in the accounts was and did not inquire "until now." He said he knew the man; he was living at *Tiruvarur*; he kept no profession of any kind as far as he knew; he said he had a house; he must look to the accounts to see if there were any dealings with that man before he went to *Rajan* Katlai. He then spoke about credit in the name of *Tayagu Chetti* which he had been charged with. He said that one *Tyagaraja* Pillai and a Mudaliar kept a common shop at *Tiruvarur*; that the *Kanakku* Pillai used to borrow from him for their Katlai purposes and wanted to give credit in the name of *Tiyagu Chetti,* and he gave him leave to do so; that he knew *Tyaraja* Pillai who came to him to demand money due to him; that there was no man of the name of *Tyagaraja Mudali* at *Tiruvarur,* and he had made a mistake when he said before that the creditor was *Tyagaraja Mudali*; that the Judge was not well at the time, and he was told to answer readily and to the point, and so the mistake happened. The Judge's diary in the record shews that he was ill at this time. This part of *Ponnambala's* evidence appears to be what is referred to in the judgment of the High Court as

"matters against him in evidence, which he ought to have explained, but has not explained satisfactorily." It is to be observed that the Plaintiff's witnesses had been examined before the predecessor of the Subordinate Judge who gave the judgment, but *Ponnambala* was examined before that Judge, who did not express any dissatisfaction with his evidence. The other witnesses spoke about his being a Tambiran of *Dharmapuram*, except the last, *V. Khrishna Aiyar*, a vakil of the High Court. His evidence was that the nomination was made by the late Pandara *Sannadhi* after consideration of the merits and demerits of the Tambirans from whom the selection might be made, and with a desire to select one who might not be disapproved by the Court. From his evidence the nomination appears to have been honestly made, and not from any undue influence or pressure.

Some of the evidence for the Plaintiff on the latter question has been already noticed. Two remain to be mentioned. *Subramania Mudaliar*, who lived in the *Tinnevelly* district, and was one of the chief disciples of the *Dharmapuram* Adhinam, said that when *Ponnambala* was in the Odakkam, he told him he belonged to the *Madura* Matam (apparently meant for Adhinam) in reply to his questions where he came from, where he received his Kashayam, and what he was doing. He was then dressed in the *Dharmapuram* style. "From what *Ponnambala* told me I say he belongs to the *Madura* Adhinam. I have no other reason for saying that he is a Tambiran of the *Madura* Adhinam." He also said he told him he belonged to *Panangudi*. *Theetharappa Mudali*, who also lived at *Tinnevelly* and is one of the disciples of the *Dharmapuram* Mutt, and one of the petitioners for the appointment of the *Saminadha* Tambiran, said that the *Dharmapuram* Adhinam had a mutt at *Sivasilam* in the *Tinnevelly* district; that *Ponnambala* was a Tambiran of the *Madura* Adhinam and belonged to *Panangudi* in the *Nanguneri* Taluk; that *Kallianpuram* is near *Sivasilam*; there was a *Kallianpuram Ponnambala*, a Tambiran of *Dharmapuram* who was dead. In cross-examination the witness said the nominee *Ponnambala* told him about his native place; that he had belonged to *Panangudi* and had received his Kashayam in the *Madura* Mutt. He is the only witness who speaks about another *Ponnambala*.

J. C.
1894
PONNAMBALA TAMBIRAN v. SIVAGNANA DESIKA GNANA SAMBHANDA PANNARA SANNADHI.

The case of the nominee *Ponnambala* was that he received his Kashayam at the mutt in *Sivasilam*, and did not belong to *Panangudi* but to *Kallianpuram*. Three witnesses, members of his family residing in *Kallianpuram*, deposed that he got his Kashayam at the *Dharmapuram* Mutt at *Sivasilam*; he was then twenty or twenty-two years of age. Another witness, *Chitambaranadha*, a Tambiran of *Dharmapuram*, said that *Ponnambala* got his Mantra Kashayam at *Sivasilam*; the witness was then present at *Sivasilam* outside the *Pujamatam*; that *Ponnambala* came to *Dharmapuram* and was employed at the Odakkam. *Ponnambala* was not asked in cross-examination or by his own pleader about the statements it had been said he had made that he came from the *Madura* Adhinam. This is a frequent omission in trials in *India* and no inference can fairly be drawn from it. Their Lordships cannot attach much weight to the evidence that *Ponnambala* said he came from the *Madura* Adhinam. Assuming that the witnesses intended to speak the truth it is possible they may not have exactly recollected what was said. He may have said he came from *Madura*, which appears to be true, and it may have been supposed by the witnesses that he meant he came from the *Madura* Adhinam. Their Lordships do not give credit to the evidence that he belonged to *Panangudi* and that there was a *Kallianpuram Ponnambala* who is dead. Upon the question whether the nominee *Ponnambala* was a Tambiran of *Dharmapuram* the High Court was silent, but as they may have thought it was unnecessary to decide it, no inference can be drawn from their silence. Upon the questions of fact in the case their Lordships have come to the same conclusion as the Subordinate Judge, and they will humbly advise Her Majesty to reverse the order of the High Court, and to order that the appeal to it be dismissed with costs, and to affirm the order of the Subordinate Judge. The Respondent *Sivagnana Desika Gnana* will pay the costs of this appeal.

Solicitor for the Appellant: *R. T. Tasker.*

Solicitors for the first and third Respondents: *Keen, Rogers, & Co.*

KISHORE BUN MOHUNT . . . . . APPELLANT;

AND

DWARKANATH ADHIKARI AND OTHERS RESPONDENTS.

KISHORE BUN MOHUNT . . . . . APPELLANT;

AND

PROSUNNO COOMAR ADHIKARI . . RESPONDENT.

J. C.*
1894
Feb. 28.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Act XIV. of 1882, *s.* 260—*Application for Execution of Decree—Res judicata.*

Where plaintiffs' application under sect. 260 of the Code of Civil Procedure for execution of a decree was dismissed on the ground that they had not afforded the defendant an opportunity of obeying it:—

Held, that a second application, after such opportunity has been afforded, is not barred as *res judicata.*

APPEAL in the first case from a judgment of the High Court (Sept. 5, 1890), which on second appeal reversed the judgment of the District Judge of *Chittagong*, and ordered execution of a certain decree which had been obtained by the Respondents; in the second case from a judgment of the High Court (Dec. 3, 1890), affirming a judgment of the District Judge and ordering an execution to issue.

The facts are stated in the judgment of their Lordships.

Doyne, for the Appellant in both appeals.

The Respondents did not appear.

The judgment of their Lordships was delivered by

LORD MORRIS:—

Both these appeals have been argued before their Lordships *ex parte.*

In the appeal of *Kishore Bun Mohunt* v. *Dwarka Nath Adhikari*

* *Present:* —LORD MACNAGHTEN, LORD MORRIS, and SIR RICHARD COUCH.

J. C.
1894
KISHORE BUN MOHUNT v. DWARKANATH ADHIKARI.
KISHORE BUN MOHUNT v. PROSUNNO COOMAR ADHIKARI.

and Others, a judgment of the High Court at *Calcutta* is impeached, which reversed a judgment of the District Judge of *Chittagong*, who had upheld, with a variation, a judgment of the Moonsif of *Sitakund*.

The facts of the case are shortly as follows: In the year 1880 the Respondents, who are officiating priests in the temple of a deity called *Sumbhu Nath Deb*, instituted a suit in the Moonsif's Court against the Appellant for the purpose of establishing their right to perform certain offices at the shrine and to receive certain offerings from the votaries. On the 31st of March, 1881, a decree was made by the Moonsif, by which the claim of the Respondents was allowed, and the Appellant was ordered to deliver to the Respondents certain articles necessary for the performance of the offices in question, and the right of the Respondents to the offerings claimed was decreed. This decree was not complied with, and in the year 1885 the Respondents applied to the Moonsif for leave to execute it under sect. 260 of the Civil Procedure Code. The Appellant contended that the decree was merely declaratory, and was not capable of execution as prayed.

Section 260 provides as follows: "When the party against whom a decree for specific performance of a contract, or for restitution of conjugal rights, or for the performance of or abstention from, any other particular act, has been made, has had an opportunity of obeying the decree or injunction and has wilfully failed to obey it, the decree may be enforced by his imprisonment, or by the attachment of his property, or by both."

The Moonsif gave judgment on the 25th of May, 1886, ordering the decree to be executed. There was an appeal from the Moonsif to the District Judge of *Chittagong*, who, on the 24th of March, 1887, modified the Moonsif's judgment, and directed the decree to be executed in part only. Both parties appealed to the High Court, and the High Court, on the 19th of December, 1887, delivered judgment in these terms: "The order of the Lower Court appealed against in the appeal from Appellate Order, No. 112, of 1887 will be set aside, and that appealed against in the appeal from Appellate Order, No. 194, of 1887, will stand confirmed. We express no opinion as to whether or not the decree is capable of execution."

On the 1st of February, 1888, the Respondents again petitioned the Moonsif for execution of the decree, stating in their petition that they had, since their first action, served the Appellant with notice, and had presented themselves at the temple at certain times specified in the notice, in order that they might be allowed the opportunity of performing a certain ceremony, and receiving certain articles necessary for its performance, and so afford the Appellant an opportunity of complying with the decree.

The Appellant did not supply the articles in question, and objected to the petition on the ground that it was barred as being *res judicata.* The Moonsif held that the matter was *res judicata,* and dismissed the petition. The Respondents appealed to the District Judge of *Chittagong,* who affirmed the decision of the Moonsif on the question of *res judicata,* while reversing it in another respect. Both sides appealed to the High Court, who reversed the decision of the District Judge, and declared that the Respondents were entitled to enforce their decree under sect. 260 of the Civil Procedure Code, and ordered execution to issue accordingly.

The High Court pointed out in their judgment that their decree in the first suit was only intended to determine that the particular application for execution then the subject of appeal could not be allowed. The Respondents had not at that time placed themselves in the position of having the right to have their decree executed, inasmuch as they had not given notice to the Appellant, and so afforded him an opportunity of complying with it. They had not gone to the temple so as to be ready to receive the articles necessary for the performance of the ceremony if they were offered to them. That matter of fact distinguished the second suit entirely from the first.

It is therefore quite plain, in their Lordships' opinion, that the question was not *res judicata.* Their Lordships think that the Respondents were properly non-suited in the first action, because they had not then shewn that there was a demand made by them on the Appellant, and an opportunity thus given him of complying with the decree. In the second action they remedied this defect, and stated in their petition that they had given

J. C.
1894
KISHORE BUN MOHUNT v. DWARKANATH ADHIKARI.
KISHORE BUN MOHUNT v. PROSUNNO COOMAR ADHIKARI.

the Appellant notice of their demand, and had duly presented themselves at the temple. The Appellant, in his petition of objection, does not deny this, merely taking the formal objection that the notice was illegal and improper; but the fact of the notice having been given, and of the Respondents having presented themselves at the temple in pursuance of it, was never denied, and was, in fact, taken for granted throughout the trial. Indeed, those fresh facts constituted the difference between the two actions.

An objection was taken on the part of the Appellant before their Lordships that the notice was not properly before the High Court, and that the High Court was not warranted in assuming its existence. But it is necessary, in considering such an objection, taken at so late a stage, to look carefully at the proceedings in the Courts below; and it is clear to their Lordships that throughout the whole course of the trial the fact of the notice having been given was admitted.

On these grounds their Lordships are clearly of opinion that the judgment of the High Court should be affirmed, and they will humbly advise Her Majesty accordingly.

In the appeal of *Kishore Bun Mohunt* v. *Prosunno Coomar Adhikari*, the question of *res judicata* does not arise at all; but it is said that the decree was merely a declaratory one, which could not be executed under sect. 260 of the Civil Procedure Code. Their Lordships have no doubt that it is a decree which can be so executed, and that the High Court were right in dismissing the appeal from the District Judge who had directed the execution to issue. Indeed, it has not been substantially argued that if the first appeal fails this appeal can succeed.

Their Lordships will therefore humbly advise Her Majesty to dismiss this appeal.

Solicitors for the Appellant: *T. L. Wilson & Co.*

BALA GOURI VALLABHA TEVAR . . PLAINTIFF;

AND

ZEMINDAR OF SHIVAGANGA AND OTHERS DEFENDANTS.

J. C.*
1894
April 20.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Sunnud of Shivaganga—Suit to set aside Sunnud—Fraud.

Where the Appellant claimed, in 1886, that a sunnud which, in 1803, appointed the zemindar of *Shivaganga* had been obtained from the Government by the fraud of the grantee, who, with his descendants, had thenceforth enjoyed the estate to the knowledge of the Appellant's predecessors:—*Held*, that no suit would lie after the lapse of so long a period.

APPEAL from a decree of the High Court of *Madras* (March 29, 1889) which, after a remand, affirmed a decree of the District Judge of *Madura* (Nov. 20, 1886) dismissing the Appellant's suit.

The suit was brought by the Appellant to recover from the Respondent *Periasamy* possession of the zemindari of *Shivaganga*, which has been the subject of prolonged litigation in *Madras* and before their Lordships, together with all the rights and honours and properties thereto appertaining. A number of Defendants were added (in all 124) in respect of various alienations which had been made of portions of the estate from time to time. As a condition precedent to obtaining relief the Plaintiff prayed to have it declared that the judgment of their Lordships of the Judicial Committee of the 30th of November, 1863 (1), and the order of Her Majesty in Council consequent upon it made in the suit and appeal of *Katama Nachiar* (daughter of *Gouri Vallabha Tevar*) against the Plaintiff's father *Bodha Gurusami Perya Odaya Tevar* are not binding on the Plaintiff; as having been obtained by the fraudulent practices of the said *Gouri Vallabha* and *Katama Nachiar* and her agents, and by the suppression of "documents establishing the sole and exclusive right of the Plaintiff's family to the zemindari." The Plaintiff

* *Present*:—LORD HOBHOUSE, LORD ASHBOURNE, LORD MACNAGHTEN, and SIR RICHARD COUCH.

(1) 9 Moore's Ind. Ap 539–617.

J. C.
1894
BALA GOURI VALLABHA TEVAR v. ZEMINDAR OF SHIVAGANGA.

complained that in pursuance of that order *Katama Nachiar* ousted the Plaintiff's father from possession of the zemindari in the year 1864, and continued herself in possession until her death in 1877, after which *Dorasinga Tevar*, the father of the Respondent *Periasamy*, recovered possession from her son by the decree of the *Madras* Courts, affirmed on appeal by the Privy Council (1), and held such possession until his death on the 19th of July, 1883, when the Respondent *Periasamy* as his eldest son succeeded to the zemindari.

The Plaintiff alleged that his father, the said *Bodha Gurusami*, died on the 5th of October, 1872, leaving him, the Plaintiff, an infant of the age of eight years; that he came of age on the 27th of December, 1882; and came to the knowledge of the fraudulent acts complained of only in the beginning of the year 1885. He did not, however, specify what fraudulent acts he complained of, nor what documents or other evidence he charged to have been suppressed.

The Respondent *Periasamy* by his written statement, in which his younger brothers joined, contended that the zemindari of *Shivaganga* was the self-acquisition of his maternal grandfather *Gouri Vallabha Tevar*, and had devolved upon him, the first Respondent, according to Hindu law, and that the fact of such self-acquisition was conclusively established, as *res judicata*, by the decisions of the Judicial Committee which the Plaintiff sought to set aside, and the Defendant traversed the allegations of fraud contained in the plaint, and pleaded "that they were too general and vague to admit of any issue being framed in reference thereto, and that the said allegations, even if true, were insufficient in law to deprive the said decision of Her Majesty in Council of its effect and operation as a bar to the present suit." He also pleaded limitation.

Later, the Plaintiff more specifically alleged that "in 1802, when the Permanent Settlement Account was submitted to the Collector of *Madura*, *Gouri Vallabha Tevar* fraudulently inserted his name and title between the name and title of his brother *Woya Tevar*, so as to enable him to pretend and assert thereafter that he was grantee of the said zemindari," and that "in 1803

(1) Law Rep. 8 Ind. Ap. 99, dated the 14th of May, 1881.

the Government forwarded to the said *Woya Tevar*, through the Collector, an Istimrar sunnud for the said zemindari, but *Gouri Vallabha Tevar* kept possession thereof and pretended that he was the person named therein as grantee."

The District Judge dismissed the suit as barred by limitation whether or not there had been fraud on *Gouri Vallabha's* part. The High Court remanded it for trial of the issue as to fraud, saying: "It is now alleged that *Gouri Vallabha Tevar* had fraudulently caused that sunnud to be prepared, inasmuch as he caused accounts to be prepared in the Collector's office which were preliminary to the issuing of the sunnud, and in which he inserted his own name as zemindar, and that the issuing of the sunnud in his name was the result. That it was plain therefore that the allegation of fraud as to the preparation of that sunnud is material to be tried."

The District Judge, having before him all the evidence put in by the parties on the remand, found "that the allegations of fraud contained in the plaint and in Plaintiff's supplemental statement of the 16th of August, 1886, are not true in fact."

He went at length through the documentary evidence adduced chiefly by the Plaintiff, and arrived at the conclusion that there was no evidence of the fraud alleged by the Plaintiff as to *Gouri Vallabha Tevar* having got his own name inserted in the sunnud in the place of that of his elder brother, or that the Government had intended to make the grant to the elder brother.

On the 20th of March, 1889, the High Court, in a short judgment, expressed their full concurrence with the findings of the District Judge, and dismissed the Plaintiff's appeal with costs.

Cowie, Q.C., and *Mayne*, for the Appellant.

Doyne, for the Respondents.

The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

This case appears to their Lordships to be a very simple one. The Appellant contends that by a fraud alleged to have been committed in the years 1802 and 1803 by *Gouri Vallabha Tevar*,

J. C.
1894
BALA GOURI VALLABHA TEVAR v. ZEMINDAR OF SHIVAGANGA.

a sunnud appointing him zemindar of *Shivaganga* was granted to him by the Government in 1803, whereas it should have been granted to his elder brother *Woya Tevar*. But *Gouri Vallabha Tevar* entered upon the zemindari at that time, and he and his descendants have enjoyed it ever since.

It is quite clear that there could have been no secrecy about his appointment to be zemindar. The matter was the subject of public proclamation, and *Woya Tevar* must have known, and all his descendants must have known, that the sunnud granting the zemindari was in the name of *Gouri Vallabha Tevar*, and that the zemindari was actually occupied and enjoyed by *Gouri Vallabha Tevar* and his descendants.

No suit can be brought forward at the present time to re-open the question, and their Lordships will humbly advise Her Majesty to affirm the decree of the High Court, and dismiss the appeal with costs.

Solicitors for the Appellant: *Rowcliffes, Rawle, Johnstone, & Gregory.*

Solicitors for the Respondents: *Lawford, Waterhouse, & Lawford.*

J. C.*
1894
April 19, 20; *June* 9.

KADER MOIDEEN . . . . . PLAINTIFF;

AND

C. W. NEPEAN AND OTHERS . . . . . DEFENDANTS.

ON APPEAL FROM THE JUDICIAL COMMISSIONER OF LOWER BURMAH.

Construction—Evidence—Sale or Mortgage.

Where an entry "ownership transferred to *J. N.*" had been made in the Register of Sales of Waste Lands against lots granted to the Appellant, and had been indorsed on the grants relating thereto:—

Held, reversing the decision of two Appellate Courts, that although the inference in favour of sale and undisclosed consideration might have been right if the indorsements had stood alone, yet that on the whole evidence the transaction was not one of sale, but of transfer by way of security.

The entry was in pursuance of a joint petition by the Appellant and *J. N.*

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* *Present*:—LORD HOBHOUSE, LORD ASHBOURNE, LORD MACNAGHTEN, and SIR RICHARD COUCH.

which on its true construction was inconsistent with an absolute sale; the undisclosed consideration could only have been the cancelment of Appellant's indebtedness to *J. N.*: the latter retained uncancelled the documents relating thereto, including a mortgage which was subsequently enforced: the surrounding probabilities were in favour of the Appellant's retention of a right to redeem.

APPEAL from a decree of the Judicial Commissioner of *Lower Burmah* (Sept. 28, 1892) affirming a decree of the Commissioner of the *Tenasserim* Division (July 18, 1892), which reversed a decree of the District Judge of *Shwegyin.*

The facts are stated in the judgment of their Lordships.

The suit was brought on the 4th of December, 1891.

The plaint, after setting out the Appellant's acquisition of the three properties, the subject of suit, and the mortgage of the same to *John Nepean* on the 6th of June, 1870, proceeded:—

"That in 1871 Government pressed the Plaintiff for the balance of the purchase-money due in respect of the sale of the said lands. The Plaintiff was unable to meet the demand, and Mr. *Nepean* refused to advance any more unless he was further secured by obtaining possession of the lands himself. And shortly before the 3rd day of June, 1871, it was agreed between the Plaintiff and the said Mr. *John Nepean* that the mortgage was to continue, but that the latter should get possession of the said lands, draw the rents and profits thereof, appropriate those rents and profits toward payment of the principal and interest of the debt due by Plaintiff to him, the said *John Nepean*, till such time as the whole amount due was paid off, and that to facilitate the collection of the rents and profits, and to shew that possession had passed to him, the said Plaintiff was to procure a transfer of the lands on the Waste Land Register to the said *John Nepean.*

"That on the 3rd day of June, 1871, this transfer was duly effected, and the mortgage deed remained with the said *John Nepean*, as evidence of the nature of the transaction."

The plaint then proceeded to state the payments made by *John Nepean*, and to charge that he had, by collecting the rents and profits of the land, fully paid and satisfied any claim he might have in respect of the mortgage, and concluded with the

J. C.
1894
KADER MOHEEN v. NEPEAN.

usual prayer for accounts, and to be allowed to redeem on payment of any balance still due.

The Respondents in their written statement, after admitting the Appellant's acquisition of the lands and the mortgage of 1870, proceeded :—

". . . . About two days before the said lands would have been forfeited for default in payment of the purchase-money and interest thereon, the Plaintiff requested the said *John Nepean*, who, with the concurrence of the Revenue Officer of the Local Government, agreed to accept an absolute and unconditional transfer to him of the whole of the interest of the Plaintiff in the said lands, and in consideration thereof to cancel the said mortgage of 1870, to release the Plaintiff from his covenant to repay the 3000 rupees and interest secured thereby and other debts, and to pay, and indemnify the Plaintiff from all liability to pay, the balance of the purchase-money of the said lands and the interest due thereon; that this agreement was carried into effect by the said Revenue Officer; that the unconditional transfer of the said lands to *John Nepean* was registered according to the said rules hereinbefore referred to ; and that the said *John Nepean* was put into possession of the said lands by the order of the said Revenue Officer.

"They admit that the said transfer was duly effected on the 3rd day of June, 1871, and that the said mortgage deed, being a document of title and being in *John Nepean's* hands with all the other documents of title, remained with him as the owner of the freehold at that time, but they deny that it so remained with him as evidence of the transaction alleged by the Plaintiff in the 5th paragraph of the plaint."

The District Court found that the transfer of the 3rd of June, 1871, was not a transfer by way of sale but a usufructuary mortgage.

The Commissioner reversed this decision. He said :—

"The real issue is, was the transaction of May–June, 1871, a mortgage or a sale? The written evidence of this transaction is contained in the joint application, in the indorsements on the original deeds of grant, and in the entries in the register. If this is all the admissible evidence there cannot be any reason-

able doubt that the transaction was a sale. The application is for a substitution of names; the entries in the register and on the deeds of grant describe what is transferred as ownership, and in these *John Nepean* is described as 'new holder.'

"The contention of the Plaintiff Respondent is that other evidence is admissible, such as the deed of 1870, letters to a third person written by both parties, and oral evidence to shew the surrounding circumstances. This evidence the Court below admitted and acted on.

"I am of opinion that the oral evidence is not admissible."

The Judicial Commissioner affirmed the decree of the Commissioner. He held that it was quite clear that whatever the view of the Appellant may have been when he signed the indorsements on the grants, *Nepean* knew their effect perfectly well, and never for a moment intended to occupy the position of a mortgagee; that the insertion in the indorsements of the words "ownership transferred," which were absent from the joint petition of the 29th day of May, 1871, might indicate fraud, but did not support the view that *Nepean*, who knew English, intended on the 3rd day of June, 1871, to constitute himself a mortgagee; that parol evidence was not admissible to prove that the transaction of the 3rd of June, 1871, was a mortgage; that, upon the whole of the evidence, he did not feel satisfied that fraud was perpetrated by *Nepean*, or that he ever agreed, in May or June, 1871, to accept the land in mortgage.

The Solicitor-General (Sir *John Rigby*), *Branson*, and *G. J. Turner*, for the Appellant, contended that the oral evidence and other documents over and above the entry in the Waste Lands Register, and the indorsements on the grants, were admissible in evidence for the purpose of shewing the real nature of the transaction of the 3rd of June, 1871. It was an admitted fact that the whole of the terms of the agreement under which *John Nepean* got possession of the lands in suit were not contained in the entry and the indorsements. Sects. 91 and 92 of the *Indian Evidence Act*, 1872, did not prevent the admission of such evidence as was tendered to shew the real nature of the agreement. The Judicial Commissioner was wrong in holding

J. C.
1894
KADER MOIDEEN v. NEPEAN.

that the entry and indorsements effected an absolute conveyance of the lands in full proprietary right to *John Nepean*. The evidence in the case and the conduct of the parties all shewed that the transaction of the 6th of June, 1871, was only a further development of the mortgage of 1870, and was not an absolute transfer. And, consequently, there ought to have been a decree for relief as prayed to the Appellant as mortgagor.

Cozens-Hardy, Q.C., *James Fox*, and *Heaton*, for the Respondents, contended that the burden lay on the Appellant to shew that the transaction was a mortgage and not an absolute transfer. The undisputed contemporaneous documents were against him. They pointed distinctly to an absolute transfer of ownership. Evidence of an alleged oral agreement to vary the written disposition of the lands contained in the entry and in the indorsements on the grants was not admissible, and, if it were, it did not discharge the Appellant's burden of proof. Conversations alleged to have taken place twenty years ago were wholly insufficient to outweigh the indorsements. Various orders made by the Deputy Commissioner in 1871, when the facts were fresh in his mind, were relied upon to shew that he understood the transaction to be an absolute transfer, and that he dealt with *Nepean*, to the Appellant's knowledge, on that footing. The legal effect of the indorsements and entry was to transfer the absolute ownership, and they were so understood and acted upon at the time by all parties; and the evidence brought forward by the Appellant was wholly insufficient to destroy that effect, and entitle him after the lapse of time to insist that the true effect of the transaction was contrary to the legal effect of the written words used to create a mortgage which he was now entitled to redeem.

The Solicitor-General replied.

1894
June 9.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN:—

The Appellant *Kader Moideen* seeks to redeem certain lands situated in the district of *Shwegyin* in *Lower Burmah* which the

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Respondents, deriving title from one *John Nepean* who died in 1883, claim to hold free from any right or equity of redemption.

The lands in question were originally waste lands the property of the Government. In 1866 and 1867 they were sold to *Kader Moideen* in three lots under the rules then in force for the sale of waste lands in *British Burmah*. On payment of preliminary expenses and a fraction of the purchase-money as required by the rules, each of the three lots was conveyed to *Kader Moideen* "in full proprietary right" subject to conditions intended to protect the interest of the Government as an unpaid vendor. In 1871, at the joint request of *Kader Moideen* and *John Nepean*, the property was transferred into *Nepean's* name in the Government books, and thenceforth he was recognised as owner and acted as such. The question is: What was the real meaning of this transaction? Was it an absolute sale or a transfer by way of security? The question is one of some difficulty depending upon the construction of documents not wholly unambiguous, and upon a consideration of all the surrounding circumstances. Very little light is thrown upon the transaction by what has occurred since or by the oral evidence on the one side or on the other, which to say the least does not merit implicit confidence. The Judge of First Instance, the District Judge of *Shwegyin*, decided in favour of *Kader Moideen*. His decision was reversed on appeal by the Commissioner of the *Tenasserim* Division. The Commissioner's judgment was affirmed by the Judicial Commissioner of *Lower Burmah*, from whose Court the present appeal is brought.

The Waste Land Rules to which reference has been made were a collection of regulations authenticated by the signature of the officiating secretary to the Chief Commissioner of *British Burmah* and published by the Government of *India* (Foreign Department) under date the 30th of June, 1863. All unassessed waste lands not subject to any private rights of proprietorship or exclusive occupancy were to be available for purchase in lots not exceeding 5000 acres. But the same person might apply for two or more lots. Applications for purchase were to be entered in a register. There was to be a rough survey, and then if the application was found to be in order the land applied for was to

J. C.
1894
KADER MOIDEEN v. NEPEAN.

be advertised for sale by auction at an upset price on a day named in the advertisement. Government sales were to be held quarterly. Sales were to be entered in a register in a prescribed form containing separate columns for all necessary particulars, the last column, No. 15, being headed, "Remarks in which are to be entered all transfers subsequent to the sale and the names of the persons to whom transferred." Rule 12 provided that on payment of one-tenth of the purchase-money and of all expenses of survey, demarcation, advertisement and sale the purchaser should "receive a deed in the Form D annexed signed by the Deputy Commissioner conveying to him the lot in full hereditary and transferable proprietary right free for ever from all demands on account of land revenue." The 18th rule provided that the purchaser might pay the whole of the purchase-money when the lot was sold, or if he chose he might pay a portion not being less than 10 per cent. at the time of the sale and the remainder in instalments at any future time "not being more than ten years from the date of sale." In the latter case simple interest at the rate of 10 per cent. per year was to be charged on the unpaid portion of the purchase-money, and the whole lot was to "remain hypothecated as security for the full discharge of the amount including principal and interest and be liable to sale by order of the Deputy Commissioner if the said amount be not paid within the stipulated period." Interest on unpaid purchase-money was to be payable on the 15th of May in each year.

Form D—the prescribed form of conveyance—so far as material is as follows:—

"Know all men by these presents that the Chief Commissioner of *British Burmah* has conferred on ———, his heirs, executors, administrators, and assigns the grant of a tract of land measuring ——— British statute acres, situated in ———, to be holden by him in full proprietary rights, subject to the following conditions:—

"1. The purchase-money for this grant is Rs.———, of which Rs.——— have been already paid. On the ——— if the entire purchase-money has not been paid up interest at 10 per cent. per annum will be charged on the balance and thereafter until the

entire purchase-money be paid up such interest will be chargeable on all unpaid arrears of the purchase-money, and all payments by the grantee shall be first carried to the credit of any outstanding arrear of interest due on such purchase-money.

"II. Arrears of interest shall be treated in the same manner as arrears of land revenue, and be subject to the same measures of realization.

"III. No transfer of proprietary right, or transfer of interest, or creation of new interest in the grant beyond a lease of three years, will be recognized by the Civil Courts or the Revenue Officers of Government unless duly registered in the office of the Deputy Commissioner of the district in which the grant is situated.

* * * * * *

"IX. On the payment of the purchase-money in full, with all arrears of interest, the grant will belong to the grantee free for ever from all demand for land revenue."

It may be observed in passing that in Form D no period is limited for the payment of the balance of the purchase-money. On the other hand, no provision is to be found in the rules corresponding with Condition III. in Form D. Nor is there anything in the rules purporting to give the force and efficacy of a conveyance to an entry in the Register of Sales of Waste Lands.

The three grants in favour of *Kader Moideen* were all in the prescribed form. The total quantity of land in the grants was about 4524 acres. The aggregate amount of purchase-money was Rs.7158 13*a.* 7*p.* The amount paid up was Rs.768 9*a.* 11*p.* The annual amount of interest payable on the balance was Rs.639 0*a.* 5*p.*

Kader Moideen had not sufficient means to turn these waste lands to a profitable account. Nor could he afford to pay the purchase-money in full and wait until the lands rose in value with the general improvement of the country under British rule. He was a poor man at the time, and such attempts as he made to develop the property were not remunerative. He brought a number of people upon the land who were to pay no rent for three or four years. They were collected in settlements which are dignified by the style of villages and hamlets. The settlers

J. C.
1894
KADER MOIDEEN v. NEPEAN.

received a little money and some rice, and perhaps a few buffaloes. They made some clearances round the settlements. But the undertaking did not prosper. Many of the settlers left; their places were not filled by others, and lands which had been reclaimed became jungle again.

In his difficulties *Kader Moideen* had recourse to Mr. *John Nepean*, a prosperous money-lender in *Shwegyin*, and obtained accommodation from him apparently on the usual terms and with the usual result. It was contended by the learned counsel for the Respondents that the money paid to the Government for interest while the lands stood in *Kader Moideen's* name was supplied by *Nepean*. Very probably that was so. The contention is certainly correct as regards the payments made in 1869 and 1870.

On the 6th of June, 1870, *Kader Moideen* assigned his interest in the lands in question to *Nepean* by way of mortgage to secure Rs.3000, which *Kader Moideen* acknowledged to have received that day "in cash." He bound himself on or before the expiration of ten months to repay the loan with interest at the rate of 3 per cent. per month, the principal and interest being payable in a lump sum. In default, *Nepean* was empowered to sell, and *Kader Moideen* undertook to make good any deficiency. Out of the sum secured Rs.639 0*a*. 5*p*. were paid to Government in discharge of interest. The balance, all but a few rupees, consisted of old debts and arrears of interest. The mortgage is in English, a language which *Kader Moideen* did not understand. It is referred to as Exhibit F.

In the year 1871, as the time approached for payment of interest to the Government, *Kader Moideen* was at his wits' ends for money. Twice apparently he had been put into jail for non-payment of some judgment debts, and twice he had been released on proof of his inability to pay. *Nepean* refused to lend him anything more, and he had neither cash nor credit.

On the 12th of May, 1871, *Kader Moideen* presented a petition in the Court of the Deputy Commissioner of *Shwegyin*, setting forth the Government grants, and alleging that he had given buffaloes and food to poor people to clear the land. Then he complained that the people on the land had been interfered with, and that he had lost a large amount of money, and he prayed

the Court to make an inquiry according to the law, and pass such order as the Court might think proper.

On the following day, the 13th of May, *Kader Moideen* presented another petition, complaining that his petition of the 12th of May had been rejected, and suggesting that if no inquiry were made on that petition "no benefit would be derived for the moneys which had been paid by him," and adding that he thought that no benefit would be derived "if he paid the money due for the present year," and, therefore, he prayed that if the Government did not wish to settle the matter in respect of the land moneys which had already been paid by him might be refunded to him, and the land taken possession of.

It was suggested, and it seems not improbable, that these applications were made merely with the view of procuring some indulgence from Government.

On this petition the Deputy Commissioner, Major *Duff*, passed an order stating that he declined to go into vague general complaints, but adding, "if Petitioner wishes to give up the land let him state exactly the terms on which he will relinquish it, and he will meet with every encouragement free [? from me]."

Nepean came to hear of these applications, and naturally he was alarmed for his security. So he presented a petition which, after stating that he had a lien on the three grants, and that he had heard of *Kader Moideen's* application, proceeded as follows:—

"Your Petitioner begs that the Waste Land Rules referred to in the grant (sect. 2) now in his possession may be carried out and orders issued accordingly.

"That if *Kader Moideen* be unable to pay the interest due to Government, your Petitioner may be allowed to occupy his place in the matter after the above rules have been carried out.

"That your Petitioner is ready to produce these three grants and the mortgage bond held by him to prove his claim."

The order passed was:—

"The time given for payment has not yet expired and in such cases a little grace is always allowed so that at present I am unable to pass any definite order in the matter.

"*A. G. Duff*,
"15th May 1871."

J. C.
1894
KADER MOIDEEN v. NEPEAN.

On the 20th of May, 1871, before the Deputy Commissioner, a report was read stating that *Kader Moideen* had failed to pay Rs.639 0*a*. 5*p*. due on the 15th of May. The matter was ordered to stand over till the 25th. But as regards *Nepean's* application an order was made that notice should be issued to him to appear on the 23rd if he should think fit and shew cause why his claim to intervene should not be rejected under sect. 3 of the grant.

Nepean appeared on the 23rd and presented another petition, alleging that a transfer of interest had been created by the mortgage of the 6th of June, 1870, and the deposit of the three grants, and after protesting against *Kader Moideen* allowing the Government to resume the land before satisfying his claim, he stated that in the event of the Government not being able to recover their dues on the land from *Kader Moideen*, he would be willing to make good the amount, so that the Government would be no loser by the transfer.

The Deputy Commissioner, having heard *Nepean* on the subject, rejected his application, and deferred the case as against *Kader Moideen* till the 26th.

On the 26th of May it was ordered that notice be served on *Kader Moideen* conformably with sect. 1, rule 46, of the Revenue Rules, that in default of payment within the time therein specified the land would be liable to be sold.

So far *Kader Moideen* and *Nepean* had been working separately each for his own interest. The next thing is, that they come before the Court with a concerted application. On the 29th of May they present a petition in Burmese, of which the Judge of First Instance gives the following translation, certified by him to be correct:—

"In the Court of the Deputy Commissioner, *Shwegyin*.

"The joint petition of *Kader Moideen*, land owner, and Mr. *Nepean*.

"Humbly sheweth,

"1. That whereas Mr. *Nepean* desires to transfer to his own name from the name of *Kader Moideen* the land comprised in three grants that have been made to *Kader Moideen*, *Kader Moideen* consents to the name being changed.

"2. That Mr. *Nepean* for his part will pay now the price due

for these lands together with Rs.639 0*a.* 5*p.* interest due if the three grants owned by *Kader Moideen* are transferred to the name of Mr. *Nepean.*

"Wherefore we have both come to an agreement and pray that the three grants be transferred from *Kader Moideen's* name to Mr. *Nepean's.*

"Signature of
"*Kader Moideen,*
"29th May, 1871. "*J. Nepean.*"

The order on the petition was,—

"The matter requires consideration, a definite order will be passed to-morrow.

"*A. G. Duff,*
"29th May, 1871."

On the next day the following order was passed:—

"*Rangoon,* the 30th May, 1871.

"*Kader Moideen* Mr. *Nepean* both present.

"Read petition of *Kader Moideen* and Mr. *Nepean* requesting that the lands in question may be transferred to the latter. . . .

"Court.—As Mr. *Nepean* is fully aware of the circumstances of the case and that in taking over the land he takes with it the responsibility for what is due to Government on it, I see no objection to the transfer being made and therefore—

"Order—Transfer to be made as requested.

"*A. G. Duff.*"

On the 3rd of June *Kader Moideen* and *Nepean* again attended before the Deputy Commissioner, and the following note in English was entered in column 15 of the Register of Sale of Waste Lands against each lot:—

"Ownership transferred by original purchaser *Kader Moideen* to *John Nepean* on the third day of June 1871.

"*Kader Moideen,*
(in Native character),
Original purchaser.
"*J. Nepean,*
New holder.

"Before me, *A. G. Duff,* Deputy Commissioner."

On the same day a memorandum in the same words signed and

J. C.
1894
KADER MOIDEEN v. NEPEAN.

attested in the same manner was indorsed on each of the three Government grants.

On the 5th of June *Nepean* paid into the Government Treasury Rs.639 0*a.* 5*p.* on account of interest, and Rs.3390 3*a.* 8*p.* on account of principal in respect of the lands transferred into his name on the 3rd of June. In the Waste Land Register this sum was apportioned so as to pay up in full the purchase-money of two of the lots, leaving a balance due on the third.

On the 12th of June *Nepean* paid into the Government Treasury the sum of Rs.3041 5*a.* 4*p.*, which discharged in full all claims of the Government in respect of the property.

As soon as *Kader Moideen* realized the fact that the effect of the transfer was that he was put on one side altogether, he repented of the bargain. He presented two petitions to the Court making random allegations and asking for relief on grounds more or less absurd. The Court refused to listen to him as he had transferred the property. *Nepean* presented a counter-petition and obtained a certificate that the land was legally transferred to him. Then *Kader Moideen* sued for the balance of the money expressed to be secured by the mortgage of the 6th of June, 1870, which he alleged he had never received, and he applied for leave to sue as a pauper. But this application met the fate of the rest. It was ultimately rejected on the ground that his statements on cross-examination were not satisfactory.

Baffled at all points, outcast and bankrupt, *Kader Moideen* went away to *Toungoo*, a place distant about three days' journey from *Shwegyin*. There he seems to have lived ever since. Lately, in the disturbances which followed the annexation of *Upper Burmah*, he made some money by Government contracts, and then, as he alleges, he sent a message to Mrs. *Nepean*, asking her to furnish accounts of the rents and profits of the lands which he had transferred to her husband. After some little delay a formal application to the like effect was made on his behalf. It was refused, and then the present suit was brought against the Respondents.

Among other defences to which it is not necessary to refer the principal Defendants set up that the transfer to *Nepean* was an absolute and unconditional transfer, and that *Nepean* agreed

in consideration thereof "to cancel the said mortgage of 1870 to release the Plaintiff from his covenant to repay the Rs.3000 and interest secured thereby and other debts and to pay and indemnify the Plaintiff from all liability to pay the balance of the purchase-money of the said lands and the interest due thereon."

The evidence of the witnesses on behalf of the Plaintiff at the trial is not worth much attention. No statement by the Plaintiff himself can be accepted without corroboration. There were witnesses who said they heard *Nepean* tell *Kader Moideen* that he could redeem the land at any time. One of them was a subordinate officer of the Court who remembered drafting the joint petition of the 29th of May, 1871. Another was a person who is described by the principal witness for the defence with some breadth and freedom of outline as "an East Indian gentleman of sorts," but who seems to have been neither more nor less than an itinerant hawker of jewelry. Another was a person who is now a myook or township officer. The learned Judge of First Instance gave weight to his evidence on the ground of his position and also on the ground of his age. The latter consideration is not unimportant having regard to the habits of the people and the teachings of their religion. "His age," observes the learned Judge, "is in his favour. He is fifty-nine, and the older a Burman the more truthful." But however respectable these gentlemen may be and whatever may be their claims to attention, it would be dangerous to rely upon the recollection of witnesses as to conversations which took place twenty years back.

The principal witness on behalf of the defence was a Mr. *Moss*, who claims one-fourth of the property. He was at one time in the police force, and is now apparently a certificated advocate. He had married a daughter of *Nepean* and was very intimate with him. *Nepean* "always consulted" him "about his private affairs," and got his "help to write petitions." He wrote the mortgage of the 6th of June, 1870—a well-drawn instrument except that one statement in it certainly is not quite in accordance with the facts. According to his own account, he took part in the negotiations which led to the arrangement in

J. C.
1894
KADER MOIDEEN v. NEPEAN.

question, and in his examination in chief he gave a list of the debts from which he said *Nepean* agreed to release *Kader Moideen*. Much must depend upon the view which is to be taken of his evidence.

Of the judgments which have been pronounced in this case, it is enough to say that the judgment of the District Judge of *Shwegyin* is a very painstaking and able review of the evidence before the Court. The judgments of the other learned Judges seem to be more concerned with questions as to the admissibility of evidence than with the facts and circumstances of the case.

The learned counsel for the Respondents did not contend that any evidence tending to throw light upon the real meaning of the arrangement between the parties ought to be excluded. But they suggested that the proper course would be to take the joint petition of the 29th of May, 1871, the orders made upon it, the entries in the Register of Waste Lands, and the note or memorandum indorsed on each of the three deeds of grant, and to consider the effect of those documents by themselves apart from the rest of the evidence; if the transaction so regarded presents the appearance of an absolute and unconditional transfer, then, they said, arises the question whether the rest of the evidence is sufficient to displace the *primâ facie* view of the transaction. That was a very plausible way of putting the case for the Respondents, and it was urged with much force and ability by Mr. *Fox* as well as by his learned leader. But in their Lordships' opinion the learned counsel laid too great stress on the indorsements upon the deeds of grant, and rather overlooked the effect of the statements in the joint petition.

It may be conceded that if the Court had nothing but the indorsements before it, the proper inference would be that, for some consideration or other which was not disclosed, the property had been made over to *Nepean* by way of sale. But when the joint petition and the orders made upon it are examined it becomes apparent that the entries in the Register of Waste Lands were intended merely to give effect to the prayer of the petition, and that the indorsements on the deeds of grant are nothing more than a record of the arrangement proposed by the parties and sanctioned by the Deputy Commissioner. The

petition asks that the lands may be transferred into *Nepean's* name. But that is not all. It purports to proceed upon an arrangement that *Nepean* shall forthwith pay the arrears of interest due to the Government and the balance of the purchase-money. What is the effect of this arrangement? If the transaction were an absolute sale or even an out-and-out gift it would have been immaterial to *Kader Moideen* whether *Nepean* paid the balance of the purchase-money or not. On the other hand, if the transaction was really a transfer by way of security, the condition that the purchase-money should be paid up at once was some consideration for the transfer and a stipulation essential for the complete protection of *Kader Moideen.* When once the purchase-money was paid in full the right of redemption would not be liable to be defeated by failure on the part of *Nepean* to fulfil the conditions of the Government grants. It may be suggested perhaps that *Nepean's* undertaking to pay the purchase-money was not a stipulation in favour of *Kader Moideen,* but merely an offer intended to gain the favourable consideration of the Government. But the answer is that that is not the natural meaning of the language of the petition, nor was it so understood by the Deputy Commissioner. The Deputy Commissioner warned *Nepean* that in taking over the land he was taking with it the responsibility for what was due to Government. But he did not suggest that *Nepean* as between himself and the Government was assuming any greater responsibility. He did not propose to alter the conditions of the Government grants or to bind *Nepean* to pay up the whole purchase-money at once. In fact, he completed the transfer in the Waste Lands Register before *Nepean* paid anything on account of either principal or interest.

The result therefore, in their Lordships' opinion, is that on a view of the transaction thus limited it could not have been the intention of the parties that there should be a transfer outright depriving *Kader Moideen* of all interest in the property.

In connection with this part of the case it may be stated that the District Judge points out that the Burmese word which would naturally be used to describe a transfer out and out, and which Mrs. *Nepean,* a Burmese lady, does use in her evidence to

J. C.
1894
KADER MOIDEEN v. NEPEAN.

describe the transaction, is not found in the joint petition of the 29th of May, 1871. It is, said the learned Judge, "conspicuously absent."

The next question is this: Can any reliance be placed on Mr. *Moss*' statement that the consideration for the transfer was the cancellation of all debts then due from *Kader Moideen*? According to Mr. *Moss*' story there were many interviews between *Kader Moideen* and *Nepean* in connection with the matter, and the final bargain was made in his presence on the evening of the 28th of May. His account of it is as follows:—

"Mr. *Nepean* said the land must be made over to him entirely and no other rights allowed. It was further agreed that upon the land being entirely made over all debts due from *Kader Moideen* to *Nepean* should be cancelled. It became late when the interview ended—it took place in Mr. *Nepean's* house; the bargain was that they should present a petition next day. The debts referred to were the money due on F Exhibit, and also on some promissory notes, Exhibits 1, 2, 3, 4, 5, and 17."

That account has an air of precision, but it is a careless statement at best. On cross-examination Mr. *Moss* admitted that on one of the notes Exhibit 1 (which was the largest in amount and only Rs.100 short of all the rest put together) there was indorsed a memorandum dated the 6th of June, 1870, shewing that that document did not at the time of the alleged bargain represent an existing liability on the part of *Kader Moideen*. It had been merged in the mortgage security of the 6th of June, 1870. When he gave his evidence in chief Mr. *Moss* must have been either aware or ignorant of this indorsement. If he was aware of it, his evidence was intentionally misleading. If he was ignorant of it, his recollection of the arrangement between *Kader Moideen* and *Nepean* is obviously not entirely trustworthy. Of the other documents (Exhibits 2, 3, 4, 5, and 17), two purport to be given to Mr. *Nepean*; the other three, in which the interest is at a higher rate amounting in one instance to 108 per cent. per annum, purport to be given to both Mr. and Mrs. *Nepean*. Now, it is not a little startling to find that Exhibit F and all these documents were retained by Mr. *Nepean* until his death without anything to shew that they had been cancelled by the arrange-

ment of May, 1871. It was said, and said truly, that *Kader Moideen*, who, by the way, was never worth suing during *Nepean's* life, was never sued upon any one of them. But that does not destroy or affect the inference to be drawn from their retention. Why should they have been retained? It was contrary to *Nepean's* practice. Mr. *Moss* admits that "when documents were cancelled his practice was to return them." It was suggested that *Nepean* was justified in retaining Exhibit F as a document of title relating to the lands made over to him. That may be an excuse for retaining it, but it is no excuse for retaining it uncancelled. No such excuse however applies to the case of the other exhibits. It was said that it was not wrong on the part of *Nepean* to keep these documents if he did not mean to sue upon them. But if *Nepean* had died before they were statute-barred and *Kader Moideen* had been then worth suing and had been sued he would have had probably no defence to an action by *Nepean's* legal representatives, and certainly none to an action by Mrs. *Nepean*. Then there was another excuse. It was said that *Kader Moideen* was a troublesome person, as indeed he seems to have been, and that Mr. *Nepean* was justified in not performing to the full his part of the bargain until *Kader Moideen* executed an absolute conveyance of the property in his favour. But *Nepean* never set this case up in his lifetime. His case was that the transfer entered in the Government books and recorded in the indorsements on the deeds of grant was sufficient and complete, and that nothing more was required; and if Mr. *Moss* is to be believed *Nepean* never asked for anything more. "I don't know," he says, "of any efforts being made after the transfer in 1871 to get *Kader Moideen* to sign a regular conveyance of the land."

If matters stood there, and there were nothing more in the case, the inference from the retention of the documents in question would be very strong. But it seems to be irresistible when the circumstances connected with one of these documents (Exhibit 5) are examined.

Exhibit 5 purports to be dated the 25th of June, 1869, and to be a security for a loan of Rs.300. It is not merely a bond or note binding *Kader Moideen* personally, but it is also a mortgage

J. C.
1894
KADER MOIDEEN v. NEPEAN.

of his house in *Shwegyin* to secure the sum borrowed with interest at 3 per cent. per month. This house was not situated on any part of the lands comprised in the Government grants. So Mr. *Nepean* could not have had the excuse for retaining it which it is alleged he had for retaining Exhibit F. If Mr. *Moss*' statement is correct, the house ought to have been released and the mortgage itself handed back to *Kader Moideen* when the lands were transferred to *Nepean*. Now, the subsequent dealings with this house can be traced in the record. When *Kader Moideen* applied for leave to sue as a pauper in September, 1871, he had to file a list of property belonging to him and to account for it. In that list is to be found this entry (Exh. 5), "a house mortgaged to Mr. *Nepean*. It is now under attachment." Upon this list he was examined before the Sikké or subordinate officer. In his deposition he said: "I have never paid money as interest on the money for which I mortgaged my house to the Defendant as shewn in the list filed by me." His object, of course, at that time was to shew that he had no beneficial interest in the house, by reason of the charge upon it in favour of *Nepean*. It does not appear whether *Nepean* was present at that examination or not. But he certainly was present at the cross-examination of *Kader Moideen* upon this deposition when the proceedings were removed to the Court of the Deputy Commissioner. It is not a little remarkable that *Kader Moideen* was asked no questions about this house. That it was still in mortgage to Mr. *Nepean* and under attachment seems to have been common ground. If the truth had been that the mortgage was cancelled and that *Kader Moideen* was the unincumbered owner there would have been an answer at once to his application for leave to sue as a pauper. Then it is stated in *Kader Moideen's* evidence in this suit, and not contradicted by Mr. *Moss*, that the house was actually sold under the attachment, that it came into Mr *Moss*' possession, and that *Kader Moideen* was turned out. Mr. *Moss*' statement is therefore disproved in the only instance in which it was possible to test its accuracy, and, consequently, their Lordships have no hesitation in rejecting it entirely.

The probabilities of the case remain to be considered. From the evidence before the Court it is easy to see what manner of

man *Kader Moideen* was, and what was the exact position of the parties at the time the arrangement was made. *Kader Moideen* had staked his all upon this property. He seems to have spent upon it everything he had and everything he could borrow. It was the only thing he had to look to. He evidently fancied that it was of great value. That it was of some value is plain from the Deputy Commissioner's reply to his petition of the 13th of May, 1871, and plainer still from *Nepean's* own conduct. *Kader Moideen* clung to the property desperately. He was a reckless and an unscrupulous man, and certainly had no consideration for his chief creditor. It is inconceivable that he should have consented to give the land to *Nepean* without stipulating for some benefit for himself. He was under no personal liability to the Government. The only remedy the Government had was against the land. As regards his debts to *Nepean*, he was secure in his impecuniosity. To such a man as he was a release from debts which he could not possibly pay, and for which in all probability he would never be troubled, was no benefit at all. Mr. *Nepean* was quite at his mercy. He had simply to do nothing and the land would be forfeited, and Mr. *Nepean's* chance of saving anything from the wreck would be gone. On the other hand, it was well worth *Nepean's* while to give something to get the land into his own hands. He thought so too. There is a significant passage in Mr. *Moss'* evidence. In the course of the negotiation which led to the final arrangement, the position which *Nepean* took up according to Mr. *Moss* was not that he had advanced as much as the land was worth, and that he would not throw good money after bad. His refusal to give any further assistance was based on the precarious nature of the title. What he said to *Kader Moideen*, according to Mr. *Moss*, was, "I refuse altogether to advance you more money because I find you have not got a full title to the land." Mr. *Moss*, it seems, and Mr. *Nepean* had been studying the Waste Land Rules together, and they were alarmed by the provision in rule 18 as to hypothecation. No wonder Mr. *Nepean* was puzzled by the word. "He was not a good English scholar." Later on, Mr. *Moss* adds, "Mr. *Nepean* did not understand written English fully, and that is an instance." Mr. *Moss*, who referred to books "in connection with this transfer

J. C.
1894
KADER MOIDEEN v. NEPEAN.

of land," came to the conclusion that the title was not secure so long as any part of the purchase-money remained due to the Government.

It must be added that "it is indeed a common custom in *Burmah* when land is mortgaged, even when only for a short term of years, to transfer it into the name of the mortgagee in the Revenue Registers." So says the District Judge. And the statement was not controverted.

Under these circumstances, the arrangement that would naturally suggest itself would be that *Nepean* should pay up all that was due to Government for principal and interest, and hold the land in his own name to recoup himself for everything he had advanced and for all he might have to spend in order to make the land profitable. *Kader Moideen* would be flattered with the hope of redeeming the land some day. Such a prospect or dream would be likely to take the fancy of such a man as *Kader Moideen.* And no doubt it would seem to *Nepean* at the time that he was making an empty concession, and that nothing more would be heard of *Kader Moideen* after he was once dispossessed.

It was said in the course of the argument that a decision in *Kader Moideen's* favour would involve an imputation of fraud upon a dead man; and that seems to have been the view of the Courts below. But it is to be observed that *Nepean* never asserted that he had bought the land from *Kader Moideen. Kader Moideen* had "abandoned" it. It was "legally transferred" to him. But there was no suggestion of a sale. That case was not set up until after his death—nor was he ever called upon to allow *Kader Moideen* to redeem. It is not by any means clear that he would have resisted a suit for redemption if such a suit had been brought in his lifetime.

As regards the terms of redemption, *Kader Moideen* states that the land was to be re-transferred to him when he repaid all he owed and all *Nepean* paid on account of the land to Government, and that the interest was to be 10 per cent., and to be compound interest. It was said there was no proof in support of these statements, and that they rested on *Kader Moideen's* word alone. That is true. But they are statements in some degree against

his interest, and, having regard to the rate of interest payable to Government, it seems not improbable that such an arrangement should have been made. If there is to be redemption, the terms are certainly not unfavourable to the persons in possession, and *Kader Moideen* must be held to them. As regards moneys laid out in improvements, the decree as originally framed gave no interest. On the application of the Defendants, with the consent of the Plaintiff, the decree was varied so as to give simple interest. But the rate of interest was not specified. The rate of interest will be the same as the rate of interest on the moneys paid to the Government. Probably the decree as it stands would be so construed. But in order to prevent any possible misunderstanding, the decree will be varied by leaving out the word "interest" in paragraph 2, and inserting "simple interest at the rate of 10 per cent. per annum."

In the result, their Lordships will humbly advise Her Majesty that the judgment of the Judicial Commissioner and the judgment of the Commissioner of the *Tenasserim* Division should be reversed, and the decision of the District Judge restored, with the variation above mentioned.

The Respondents must pay the costs of this appeal, and the costs in the three Courts below.

Solicitors for the Appellant: *Lattey & Hart.*
Solicitor for the Respondents: *B. R. Heaton.*

J. C.*
1894
April 18; June 9.

IMAMBANDI BEGUM . . . . . PLAINTIFF;

AND

KAMLESWARI PERSHAD . . . . . DEFENDANT.

IMAMBANDI BEGUM . . . . . DEFENDANT;

AND

KAMLESWARI PERSHAD . . . . . PLAINTIFF.

CONSOLIDATED APPEALS IN CROSS SUITS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Lessor and Lessee—Apportionment of Rent—Decree for Possession of Portion of Leased Lands.

Where the Appellant had obtained a decree for possession as lessee of certain portions of land comprised in her lease, the question as to amount of her liability for rent in respect thereof not having been raised in the suit or decided:—

Held, in subsequent suits that the Appellant, having failed to obtain a decree for possession of the remainder of the land under lease, had the same equity to an apportionment of rent as if she had been evicted therefrom. There was no ground for holding that the leases were of a speculative character, or that the Appellant contracted with knowledge that her lessor's title was disputed.

CONSOLIDATED APPEAL from decrees of the High Court (July 13, 1881) which reversed decrees of the Additional Subordinate Judge of *Monghyr* (May 20, 1889).

The question in the appeal was whether under the specific circumstances of the case the Appellant, who had been ejected from a portion of the property nominally leased to her, was entitled to a proportionate reduction of rent.

The suit and cross suit were heard together. The First Court gave *Imambandi Begum* a decree for Rs.10,126 principal with interest and costs. The High Court (*Prinsep* and *Beverley*, JJ.) differed in opinion on a matter of law. Reference was ac-

* *Present*:—LORD HOBHOUSE, LORD ASHBOURNE, LORD MACNAGHTEN, and SIR RICHARD COUCH.

cordingly made, under sect. 575 of the Civil Procedure Code, to the Chief Justice, who decided that the decree of the lower Court should be reversed, and that *Imambandi's* suit should be dismissed with costs.

Her suit was to recover mesne profits for three years of a one-anna and thirteen-gundas share of certain specified mouzahs, and also of a one-anna eleven-gundas share of certain other specified mouzahs of a revenue-paying mehal called *Bisthazari*, to which she had been declared entitled as mokurruridar or perpetual leaseholder by a judgment of the Judicial Committee on the 21st of July, 1886 (1).

The Respondent contended that he, as purchaser at a sale for arrears of revenue of a separated share of *Bisthazari*, which comprised, with other lands, the mokurruri lands so awarded by their Lordships to the Appellant, was entitled to recover from her as rent of her mokurruri lands a sum largely exceeding her claim for mesne profits, and, after setting off one claim against the other, was entitled to a decree for a balance of Rs.12,291 3*a*. 3*p*.

The decision of that contention depended on the question whether the Respondent was, under the undisputed facts of this case, entitled to demand from the Appellant the entire rent reserved by the two leases under which she claimed, or only an apportionment of it.

The facts are stated in the judgment of their Lordships.

The views taken by the Court below on the question in appeal were as follows:—

The Subordinate Judge was of opinion that the rents reserved by the mokurruri leases should be apportioned, and he fixed Rs.1227 as the correct apportionment, and accordingly deducted from the claim for mesne profits, which he found to be Rs.14,693, three years' rent at that rate with interest, or Rs.4567, and he gave the Appellant a decree for Rs.10,126.

He expressed his opinion that on the evidence there was no ground for holding, as contended by the Respondent, that the Appellant took the leases knowing that her lessors had only a fourth share in the properties leased, and that, on the other hand, the lessor's predecessor in title, *Bahu Begum*, was represented

(1) Law Rep. 13 Ind. Ap. 160.

J. C.
1894
IMAMBANDI BEGUM v. KAMLESWARI PERSHAD.
IMAMBANDI BEGUM v. KAMLESWARI PERSHAD.

in all the documents as sole owner, proving that the Appellant was probably misled.

On the Respondent's appeal to the High Court, the learned Judges, agreeing as to all other points, differed as to the apportionment of the rent.

Prinsep, J., was of opinion that, as the Appellant had not obtained the full share which her lessor purported to lease to her, she was entitled to apportionment, and that, having regard to the terms of the agreement contained in the leases, the fair inference was that the parties had intended that the rent should be proportionable to the lands demised.

Beverley, J., held that the Appellant was not entitled to any abatement of the full rent, if she insisted on taking the interest which her lessors had to give. He was of opinion that the matter was such as was contemplated by the 15th section of the *Specific Relief Act* (Act I. of 1877), and also that "there was reason to believe that both parties to the agreements were aware that the lessors' title to the entire property of *Abdur Rahman* was a doubtful one," and that the price paid by the Appellant was a low one, and there could be little doubt that the Plaintiff took the leases with the knowledge that her lessors had a title to a one-fourth share only, and the learned Judge was also of opinion that the cases of *Maw* v. *Topham* (1) and *The Earl of Durham* v. *Legard* (2) were applicable to the present case.

The matter was accordingly referred for the opinion of the Chief Justice under sect. 575 of the Civil Procedure Code. He agreed with *Beverley*, J., that it was "much more like a sale with a misdescription of the property sold than a lease of a specified area of land," and held that if the Appellant elected to retain possession of any portion of the property under the leases she must pay the entire rent. He accordingly allowed Respondent's appeals in both suits, and declared him entitled in the suit in which he was Plaintiff to the full amount of the rent reserved by the two leases (*i.e.* Rs.5801) for the years in respect of which he had sued, and to set off the aggregate of that rent

(1) 19 Beav. 576. (2) 34 Beav. 611.

in the Appellant's suit against the amount due to her for mesne profits. The result to the Appellant was that her suit stood wholly dismissed with costs, while the Respondent's right to receive the full rent reserved by the leases was established.

The Attorney-General (Sir *Charles Russell*), and *Doyne*, for the Appellant, contended that neither the *Specific Relief Act*, s. 15, nor the cases cited by *Beverley*, J., had any application to the case. On the evidence there was no sufficient ground for the view taken both by the Chief Justice and by *Beverley*, J., that the Appellant knew or believed at the time of taking the leases that her lessors had only a fourth share in the disputed properties. The opinion of the Chief Justice on that point may be laid aside, for sect. 575 only authorizes a reference to him of a matter of law. In regard to matters of fact, if the appellate Judges differ, the decision of the first Court is affirmed. The sole question of law is whether on the facts as found a lessee who only obtains one fourth share of the land demised is liable for the whole rent reserved by the lease or only for a proportionate part. Reference was made to *Imambandi Begum* v. *Kamleswari Pershad* (1), and also to a report of the case in the Court below (2). It was inequitable that the Respondent should adopt the leases in question so far as his demand for rent was concerned, and repudiate them as regards the Appellant's claim to possession of the whole of the land demised. Supposing the Respondent to have such a right, an option should have been given to the Appellant of cancelling the leases and surrendering the lands decreed to her by Her Majesty in Council. A lessee is *primâ facie* not liable for rent of land of which he never obtains possession; and it is on the lessor to prove clearly special circumstances which may have the effect of imposing such liability: see *Gilbert* on Rents, pp. 146, 165, 172; *Clun's Case*, and notes (3); *Woodfall* on Landlord and Tenant, 14th ed. p. 417. Here the plain fact was that the lessee was practically evicted owing to a third party having a title paramount to her lessor; she never succeeded in getting possession of more than a fourth: see

(1) Law Rep. 13 Ind. Ap. 160. (2) Ind. L. R. 14 Calc. 109.
(3) Tudor's L. C. 3rd Ed. p. 332.

J. C.
1894
IMAMBANDI BEGUM v. KAMLESWARI PERSHAD.
IMAMBANDI BEGUM v. KAMLESWARI PERSHAD.

Gopanund Jha v. *Lalla Gobind Pershad* (1); *Hill* v. *Buckley* (2); *Hooper* v. *Smart* (3).

Finlay, Q.C., and *Mayne*, for the Respondent, contended that under the special circumstances of the case the Appellant was not entitled to an apportionment of the rent reserved. It was contended that the evidence shewed that the Appellant obtained possession of all the land which she believed or had reason to believe that the lessors were entitled to include in the lease. [SIR RICHARD COUCH:—Was this question raised in the High Court?] It was indirectly raised by the memorandum of appeal. It is true that no special issue was settled upon this question, but the trial of the case involved this issue, which was practically raised by the Respondents' written statement. [SIR RICHARD COUCH:—Was any evidence taken specially directed to this point?] The evidence is to be collected from the judgments, particularly that of *Beverley*, J.

The counsel for the Appellant was not heard in reply.

1894
June 9.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

By a lease dated the 1st of March, 1866, made by *Tasudduck Hossein Khan*, one of the two brothers of *Mussummat Fatima Begum*, alias *Nawab Bahu Begum*, deceased, who it is stated in the lease died leaving a share of 6 annas 12 dams of another share of 15 annas 6 dams of certain mouzahs therein named, and a share of 4 annas out of another share of 15 annas 6 dams in other mouzahs also named, one half of which devolved on *Tasudduck Hossein*, and the other half on his brother, *Mirza Mahomed Taki Khan*, *Tasudduck Hossein* granted in mokurruri (perpetual) lease his half-share, viz., 3 annas 6 dams of the shares of *Bahu Begum* in the mouzahs, with the exception of those which are said to have been sold during her lifetime in execution of a decree, on receipt of Rs.4630 as nuzrana (premium), and at a

(1) 12 Suth. W. R. 109. (2) 17 Ves. 394.
(3) Law Rep. 18 Eq. 683.

fixed annual rent of Rs.2912 11*a.* 9*p.* (out of which Rs.2828 11*a.* 9*p.* were to be paid as Government revenue of the mouzahs, and Rs.84 as the lessor's profits), to *Syed Jaffer Ali.* The lease contained the following passage: "It is required that the said mokurruri-holder should remain in possession of the aforesaid shares of the above-named mouzahs, and out of the aforesaid fixed amount of rental continue to pay Rs.2828 11*a.* 9*p.* in the treasury of the Collector of *Monghyr*, and the remaining Rs.84, my reserved rent, to me the declarant, instalment by instalment."

On the 6th of April, 1866, *Mirza Mahomed Taki Khan*, the other brother, made a similar lease of his 3 annas 6 dams share on receipt of a nuzrana of Rs.2911 at an annual rent of Rs.2888 11*a.* 9*p.*, out of which Rs.2828 11*a.* 9*p.* were to be paid as Collectorate revenue of the mouzahs, and Rs.60 as reserved rent to *Mussummat Nazirunnissa.* This lease contained a similar passage as to possession and payment of the Government revenue and rent.

On the 13th of June, 1875, the Respondent's father, *Babu Ram Pershad*, bought the entire mehal of *Bisthazari*, of which the leased shares of the mouzahs were parts, at an auction sale for arrears of Government revenue, and by the terms of sect. 54 of Act XI. of 1859, entitled, "An Act to improve the law relating to sales of land for arrears of revenue," he acquired the mehal, subject to all incumbrances, and with only the rights which were possessed by the previous owner or owners. *Syed Jaffer Ali* and *Mussummat Nazirunnissa* were servants of the Appellant *Imambandi Begum*, and the leases were made to her in their names.

Disputes arose between *Imambandi Begum* and *Ram Pershad*, and in 1878 she brought a suit against him and others to establish her rights to the shares in the mouzahs comprised in the leases, of part of which shares she said she was absolutely dispossessed, and of the other part that *Ram Pershad* had denied her mokurruri right. The facts of the case were very complicated, the question being what were the shares of *Bahu Begum* and the other Defendants in the mouzahs. Judgment was given by the Subordinate Judge on the 15th of August, 1880. One of the

J. C.
1894
IMAMBANDI BEGUM v. KAMLESWARI PERSHAD.

IMAMBANDI BEGUM v. KAMLESWARI PERSHAD.

issues settled was whether the grantors of the mokurruris to the Plaintiff or the Plaintiff herself held possession of the disputed shares within twelve years before the institution of the suit or had been out of possession for upwards of twelve years. The finding of the Subordinate Judge upon this issue was against the Plaintiff, and he dismissed the suit. *Imambandi* appealed to the High Court. One of the Judges of that Court found that within twelve years next before the institution of the suit the Plaintiff herself and her lessors were in possession of the disputed property. The other Judge said that *Bahu Begum* and after her her brothers were certainly in possession as late as April, 1866. The first lease is dated the 1st of March, 1866, and the second lease the 6th of April, 1866. The suit was commenced on the 28th of February, 1878, just within the twelve years allowed by the law of limitation. Their Lordships think that it must be taken as a fact that *Imambandi* did not enter into possession under the mokurruris. The High Court found that the share of *Taki* and *Tasudduck Hossein* which they derived from *Bahu Begum* was at best one quarter of her husband's estate of 6 annas 12 dams, from which 1 anna sold by *Bahu Begum* should be deducted, leaving 13 dams in respect of some of the villages; that the share was further reduced in respect of some villages by a decree for 7 dams in favour of another person, and there remained a share of 11¼ dams in those villages The Court also said that the Plaintiff having caused a certain number of the villages covered by her leases to be sold on the 30th of January, 1868, she could not claim to hold them as lessee, and the suit must be dismissed as to them. Then it was said by the Court that if in execution of the decree the Plaintiff elected to recover possession of the aforesaid shares, she would be bound to pay annually Rs.5801 7*a*. 6*p*., the mokurruri rent reserved in the mokurruri pottahs, and the decree was so made.

Imambandi appealed to Her Majesty in Council against this decree. Upon the argument of the appeal before this Committee their Lordships were of opinion that the decree of the High Court should be affirmed with two exceptions, viz., that the one-anna share should not be deducted from the one-fourth share, and that the condition that *Imambandi* would be bound to pay the whole

of the rent reserved by the mokurruri pottahs should be omitted from the decree, leaving the liability for rent to be determined thereafter if it should become necessary, as the question whether the rent should be apportioned or not did not appear to have been raised, and ought not to be decided in that suit. The decree of the High Court was accordingly by Her Majesty's Order in Council varied to that effect, and in other respects was affirmed. *Ram Pershad* having died, his son *Kamleswari Pershad* was made Respondent in his place. Possession of what was decreed was given to *Imambandi* (between the 18th of June and the 13th of July, 1887).

On the 28th of May, 1888, *Imambandi* brought a suit against *Kamleswari Pershad* in the Court of the Additional Subordinate Judge of *Monghyr* to recover Rs.14,693 2*a.* 7*p.* as mesne profits for three years of the share of which she had been decreed possession, her claim to mesne profits for a longer period being barred by the law of limitation. *Kamleswari Pershad* in his written statement claimed to set off against the Plaintiff's claim the whole rent reserved by the mokurruri leases for the three years, his claim to rent beyond that period being also barred. And on the 30th of July, 1888, he brought a suit against *Imambandi* in which he claimed payment of the full amount of the rent so reserved. *Imambandi*, by her written statement, offered to pay such an amount of the rent reserved as was proportionate to the share of which she had obtained possession. The suits were heard together, and on the 20th of May, 1889, the Additional Subordinate Judge gave judgment in them. Upon the issue as to set-off, he found that *Imambandi* was entitled to an apportionment of rent, the annual amount of which he fixed at Rs.1227 12*a.* 2½*p.*, and, deducting that amount for three years with interest from the mesne profits allowed, he gave a decree in favour of *Imambandi* for Rs.10,126 7*a.* with interest. In the suit by the Respondent, he awarded an annual rent of Rs.1243 1*a.* 10*p.* The difference between that and the amount fixed in the other suit is not explained.

Kamleswari Pershad appealed in both suits to the High Court, which gave judgment on the 9th of June, 1891. On all the points raised except the question of apportionment the two

J. C.
1894
IMAMBANDI BEGUM v. KAMLESWARI PERSHAD.
IMAMBANDI BEGUM v. KAMLESWARI PERSHAD.

Judges agreed with the lower Court. On that point they differed, the senior Judge being in favour of apportionment and the junior against it. The matter was accordingly referred to the Chief Justice to be decided according to sect. 575 of the Civil Procedure Code. The Chief Justice agreed with the junior Judge. *Imambandi's* suit was dismissed with costs, and in the suit of *Kamleswari Pershad* it was declared that *Imambandi* should pay the full sum of Rs.5801 7*a.* 6*p.* reserved by the leases. The reference under sect. 575 being only allowed on a point of law, if two or more Judges differ upon a question of fact the decree appealed against is to be affirmed. Therefore, in this case, the facts must be taken according to the findings in the judgment of the Subordinate Judge.

Imambandi has appealed to Her Majesty in Council against the decision of the High Court, and the question to be determined is whether the rents reserved by the mokurruri leases should be apportioned. As *Imambandi* did not prove that she entered into possession under the leases and was then dispossessed, there was not an eviction in the proper sense of the word. But, when *Imambandi* was obliged to bring a suit to obtain possession, and succeeded in obtaining only a part of what was granted in mokurruri, and was precluded by the result of the suit from having possession of a substantial and the larger part, she was in a similar position to having been evicted from that part, and there is the same equity for an apportionment as in a case of eviction. Indeed, this was not disputed by the learned counsel for the Respondent. It was submitted to their Lordships that *Imambandi* knew that the lessors were not entitled to the whole of the shares leased, and a paragraph in the Respondent's written statement in the first suit was referred to. In that he said that though the extent of the share in the leases was ostensibly 6 annas 12 dams, the rent was fixed in consideration of a one-fourth share. No such question as this was raised by the issues in either of the suits, nor apparently was any evidence offered upon it. The Subordinate Judge says in his judgment: "It is contended by *Kamleswari* that the Plaintiff took the mokurruri knowing that the lessors, *i.e.*, the two brothers of *Bahu Begum*, had only one-fourth share in the disputed properties;

but that assertion is not supported by any evidence. On the other hand, we find that *Bahu Begum*, the wife of *Abdur Rahman*, was considered in documents the sole owner of the properties; and after the death of *Bahu Begum* her two brothers obtained two certificates . . . for collecting her debts under Act XXVII. of 1860. . . . Therefore it is probable that the Plaintiff was under a mistake of fact regarding the right of *Bahu Begum*." This is in the part of the judgment upon the issue whether the Defendant was entitled to any and what set-off. Their Lordships do not regard the question of the lessors' knowledge as being put in issue by the question of the amount of the set-off. If it was, there is a finding upon it which stands affirmed by the High Court. But they think that, no issue upon that question having been tried by the Subordinate Judge, it ought not to be allowed to be raised in this appeal. In the grounds of appeal to the High Court in the Respondent's suit it is said that the Court below ought to have held that the mokurruri leases were of a speculative character, and that *Imambandi* was fully aware at the time of the execution thereof that her lessors' title was under litigation. It might possibly be an answer to the claim for apportionment of the rents that the leases were taken as a speculation, and that *Imambandi* intended to take the risk of the result of the litigation; but such a case would require to be very clearly proved, and upon the evidence before the Subordinate Judge it would have been plainly wrong to have found that the leases were speculative. Their Lordships are of opinion that the rent was rightly apportioned by his decree, and that the appeals to the High Court ought to have been dismissed. They will humbly advise Her Majesty to reverse the decrees of the High Court and to order the appeals to it to be dismissed with costs, the decrees of the Subordinate Court being thus affirmed. The Respondent will pay the costs of these appeals.

Solicitors for Appellant: *Broughton, Nocton, & Broughton.*
Solicitors for Respondent: *T. L. Wilson & Co.*

J. C.*
1894
June 13;
July 28.

CHERUKUNNETH MANAKEL NEELAKANDHEN NAMBOODIRIPAD AND ANOTHER . . . . . PLAINTIFFS;

AND

VENGUNAT SWAROOPATHIL P. R. VARMA VALIA NAMBIDI AND OTHERS DEFENDANTS.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Rights of Management of a Temple—Melkoima Rights—Effect of Compromise.

Where the Respondents were entitled to certain Melkoima rights—*i.e.*, certain sovereign rights of superintending a temple—but in 1845 and 1874 entered into agreements of compromise with the Appellants, the Urallers or managers of the temple:—

Held, that the usage existing thereunder for so long a period was the best exponent of the Melkoima right, and such compromise could not be reopened on any theory as to the extent of that right.

APPEAL from a decision of the High Court (Nov. 28, 1890) affirming a decree of the Subordinate Judge of *South Malabar* at *Palghant* (Dec. 10, 1888), and dismissing the Appellants' suit.

The temple of *Kachan Kurissi* is one of great antiquity, and nothing is known as to its foundation or original constitution. The Nambidis of *Venganad* were the original rulers of the district in which the temple is situated, and continued to be such till the British Sovereignty was established over *Malabar* in 1792. As rulers the Nambidis possessed a certain undefined right of superintendence over all religious endowments of which the ownership was in others which is known by the term Melkoima. This term, as indicating a right of sovereignty, was usually applied to the person in whom the sovereignty is vested.

The family of the first Plaintiff claimed from time immemorial to have held the office of Uraller of the temple. A second Urallership had been originally held by another family, but in course of time had become vested in the family of the second

* *Present*:—LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, and SIR RICHARD COUCH.

Plaintiff. Since about 1835 it was held by that family without dispute.

The suit was brought by the Appellants, who admittedly were Urallers or trustees of the pagodas of *Kachan Kurissi*, in *Palghant*, to set aside the pretensions of the Respondents, who represent the Nambidi of *Venganad*, to be joint trustees with them in the management of the pagoda. The Courts held that they were bound by certain agreements entered into by them with the Nambidi for the time being in the years 1845 and 1874, and dismissed their suit.

Mayne, for the Appellants, contended that the agreement of 1845, which was admittedly carried out till 1874, and was made with the Nambidi as Melkoima, recognised nothing but his right as the owner of Melkoima rights, and did not operate either to transfer an Urallership to him, or to detract from the powers of those who were recognised as the only Urallers. It recognised the ancestors of the Appellants and Respondents as being Urallers and Melkoima respectively. It did not create, or purport to create, any new relationship. If the effect of the two agreements in 1845 and 1874 was to confer on the Nambidi any of the powers theretofore vested in the Urallers, they were to that extent illegal and invalid, as trusteeship is incapable of transfer wholly or in part. The Appellants were entitled, under all the circumstances of dispute, to a declaration that they possessed the full powers of Urallers, subject only to the superintending influence of the Melkoima. The evidence shewed that the Respondents repeatedly attempted to usurp rights which they did not possess, and the suit in consequence ought not to have been dismissed.

Doyne, for the Respondents, was not heard.

The judgment of their Lordships was delivered by

1894
July 28.

LORD MORRIS:—

The Appellants are the Plaintiffs in a suit which was dismissed by the Subordinate Judge of *South Malabar* on the 10th of December, 1888, and was again dismissed on appeal by the High

J. C.
1894
CHERUKUNNETH MANAKEL NEELAKANDHEN NAMBOODIRIPAD v. VENGUNAT SWAROOPATHIL T. R. VARMA VALIA NAMBIDI.

Court of *Madras* on the 28th of November, 1890. The Appellants sought for a declaration that they as Urallers were entitled to the exclusive management of the affairs of the temple of *Kachan Kurissi*, and that the Respondents had no right over or right of management in the said temple, an ancient Hindu temple of such antiquity that nothing is known as to its foundation or original constitution. The Respondents are the representatives of the original rulers of the district in which the temple is situated, who so continued till the British sovereignty was established over the country in the year 1792. The family of the Appellants appear to have always held the office of Urallers or managers of the temple, while the Nambidi possessed certain sovereign rights of superintending the temple called Melkoima rights. As long since as the year 1845 disputes arose between the ancestors of the Appellants and Respondents, and a suit was commenced as to the management of the temple, which was settled by a karar on the 16th of August, 1845; and in accordance therewith the parties two days afterwards filed a razi withdrawing the suit. The karar provides that the affairs of the temple were to be managed and that the ceremonies were to be performed jointly "just as they were hitherto," and for a period of thirty years afterwards—namely, until 1874—that arrangement was carried out. In 1874 fresh disputes sprang up between the Urallers and the Nambidi, and led to a suit in which the Urallers sought to recover certain lands belonging to the temple from a tenant who held under a demise granted by the Samudayam appointed by the Urallers and the Nambidi according to the agreement contained in the karar of 1845. This suit was compromised, and in a razi of the 21st of November, 1874, terms were set out which again determined that there should be a joint management of the affairs of the temple by the Urallers and the Nambidi. This razi was acted upon until the date of the present suit, the Urallers and the Nambidi jointly appointing a Samudayam and a Pattawali, and joining in suits to recover temple lands and in applications to execute decrees.

Their Lordships are of opinion that the state of things which has admittedly continued since 1845, and which was probably the state existing before that time and since the establishment

J. C.
1894
CHERUKUNNETH MANAKEL NEELAKANDHEN NAMBOODIRIPAD v. VENGUNAT SWAROOPATHIL P. R. VARMA VALIA NAMBIDI.

of British Sovereignty, cannot now be questioned, and that the compromise of their rights, entered into in 1845 and 1874 by the Urallers and Nambidi, is binding upon them and their successors, and cannot be now reopened upon any theory of the extent of the Melkoima right in the abstract. The usage which has existed for so long a period is the best exponent of the Melkoima right vested in the Respondents, a right twice acquiesced in by the Appellants or their predecessors in legal proceedings, in which the opportunity was afforded of a definite decision as to the rights of the respective families. Their Lordships will therefore humbly advise Her Majesty that the judgment of the High Court ought to be affirmed and the appeal dismissed. The Appellants must pay the costs of the appeal.

Solicitor for the Appellants: *R. T. Tasker.*
Solicitors for the Respondents: *T. L. Wilson & Co.*

J. C.*
1894
June 12.

RANI HEMANTA KUMARI DEBI . . . PLAINTIFF;

AND

MAHARAJAH JAGADINDRA NATH ROY BAHADUR . . . . . DEFENDANT.

HEM CHUNDER CHOWDHRY . . . . PLAINTIFF;

AND

MAHARAJAH JAGADINDRA NATH ROY BAHADUR . . . . . DEFENDANT.

FOUR CONSOLIDATED APPEALS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Res Judicata—Bengal Tenancy Act, 1885, *s.* 67—*Interest on Arrears of Rent.*

Where in 1805 the Sudder Dewani Adawlut recommended that the Respondent's talook should be separated from the Appellant's zemindary, and held at a fixed rent, and the parties thenceforth treated that recommendation as binding:—

Held, in enhancement suits brought in 1882, that the title of

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* *Present:*—LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, and Sir RICHARD COUCH.

J. C.

1894

RANI HEMANTA KUMARI DEBI v. MAHARAJAH JAGADINDRA NATH ROY BAHADUR.

HEM CHUNDER CHOWDHRY v. MAHARAJAH JAGADINDRA NATH ROY BAHADUR.

the respondent was *res judicata*, and that the rent could not be enhanced.

Interest on arrears of rent is to be calculated monthly if the rent is payable monthly. Sect. 67 of the *Bengal Tenancy Act*, 1885, only applies to rent payable quarterly.

CONSOLIDATED APPEALS from one judgment and four decrees of the High Court (March 25, 1890) affirming decrees of the Subordinate Judge of *Mymensingh* (April 26 and June 4, 1888).

The facts are stated in the judgment of their Lordships.

Finlay, Q.C., and *C. W. Arathoon*, for the Appellants.

[Reference was made to the *Bengal Tenancy Act* (VIII. of 1885), s. 67.]

Cowie, Q.C., and *Doyne*, for the Respondent, were not heard.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN:—

The Appellants are the zemindars of a ten-anna and a four-anna share in the zemindary property called *Pakhuria Jainshai*, in the district of *Mymensingh*. The Respondent is talookdar of a talook called *Balasuti*, forming part of that zemindary. The object of the four suits, which were brought by the predecessor in title of *Rani Hemanta Kumari Debi* and by *Hem Chunder Chowdhry* against the Respondent, was to obtain from him enhanced rents in respect of that talook. The main question to be decided in these appeals is whether the Courts below were right in holding that the Appellants were precluded by a decree of the Sudder Dewani Adawlut from demanding a larger rent from the Respondent than Rs.16,369 8*a*. 11*p*., or from disputing the independent nature of the Respondent's talook. The decree of the Sudder Court was pronounced on the 14th of August, 1805. By that decree the Court expressed the opinion that the then Defendant, the predecessor in title of the Respondent, was entitled to have his talook detached from the Plaintiffs' zemindary, and that in the meantime, and until separation took place, the rent of Sicca Rs.16,369 8*a*. 11*p*. should continue to be paid.

The sole objection to treating that decree as absolutely binding

comes to a question of form. It is said that the opinion of the Sudder Court was expressed in the form of a recommendation and not in the form of a decision. That undoubtedly is so; but it was an expression of opinion by a Court which was perfectly competent to deal with the matter, and it must be borne in mind that at that time the pleadings, if there were any pleadings, were not very strict or very formal. Beyond that, it appears that from the date of the decree until the present question arose both parties, zemindars and talookdars alike, have treated that expression of opinion as binding.

Proceedings were taken soon after the decree to obtain an actual separation. Those proceedings lasted for about fifty years. They were carried on with more or less activity until the year 1854, when they came to an end, not in consequence of the right of the predecessor in title of the Respondent to a separation being disputed, but because of the intervention of the Government.

The first of the four suits now pending was brought in the year 1882. Both Courts have decided the suits in the Respondent's favour. In the judgment of the High Court pronounced in all the suits the view of the Court is expressed as follows: "The suit, as laid, is a suit against an independent talookdar alleged to be a dependent talookdar under the Regulations; and it appears to us quite clear from the decision of the Sudder Dewani Adawlut, that it was decided between the parties that instead of being a dependent talook it was an independent talook within the meaning of sect. 5, Regulation VIII. of 1793, and that that decision had been acted upon by both parties for nearly fifty years." In that view their Lordships entirely concur. They are of opinion that there is no foundation whatever for these appeals on the main question of the enhancement of rent.

A subordinate question arose in appeals Nos. 20 and 21 of 1890 with regard to the interest on the rent in arrear. It appears that there are some arrears which have become due since the *Bengal Tenancy Act*, 1885. The Subordinate Court held that interest was to be calculated monthly on the arrears; but the High Court held that under the provisions of that Act, as regards arrears which became due after the Act came into force,

J. C.
1894
RANI HEMANTA KUMARI DEBI v. MAHARAJAH JAGADINDRA NATH ROY BAHADUR.
HEM CHUNDER CHOWDHRY v. MAHARAJAH JAGADINDRA NATH ROY BAHADUR.

the interest should be calculated quarterly. It appears to their Lordships that the High Court were wrong, and that the provision in sect. 67 of the Act, on which they relied, only applies to cases where the rent is payable quarterly. Here it is not disputed that the rent is payable monthly, and on rent in arrear it appears to their Lordships that interest ought to be calculated monthly. This is a matter which has not added at all, or if at all, only to an infinitesimal degree, to the costs of the appeals, and their Lordships think that this variation ought to make no difference as to the costs.

Although by the judgment of the High Court the judgment of the Subordinate Court was varied in the above respect, the decrees drawn up by the High Court contain no such variation, but simply dismiss the appeals from the Subordinate Court with costs. The decrees of the High Court are consequently right, and should be affirmed. Their Lordships will humbly advise Her Majesty accordingly. The Appellants must pay the costs of these appeals.

Solicitors for both Appellants: *T. L. Wilson & Co.*
Solicitors for Respondent: *Barrow & Rogers.*

J. C.*
1894
June 14; *July* 14.

PRIT KOER . . . . . PLAINTIFF;

AND

MAHADEO PERSHAD SINGH AND OTHERS DEFENDANTS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Hindu Law—Joint Family Estate—Separation—Onus probandi.

The *onus* is on a Hindu Plaintiff who alleges a separation in estate to prove it. The presumption is in favour of the continuance of joint estate.

APPEAL from two decrees of the High Court (Sept. 1, 1890), reversing a decree of the Subordinate Judge of *Patna* (Aug. 31, 1888), and dismissing the Appellant's suit with costs.

* *Present:*—LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, and SIR RICHARD COUCH.

The facts are stated in the judgment of their Lordships.

Branson, for the Appellant.

Doyne, and *Rattigan*, for the Respondents, were not heard.

1894. July 14. The judgment of their Lordships was delivered by

SIR RICHARD COUCH :—

Doman Sing, who died in 1806, had two sons, *Dharam Singh* and *Ramdyal Singh*. *Dharam Singh* died on the 13th of July, 1843, leaving two widows, *Mussummats Chowraso Koer* and *Bhoop Koer*, and a daughter who is the Plaintiff in the suit and the present Appellant. He had no other issue. *Ramdyal Singh* died on the 24th of December, 1839, leaving two sons, *Sheodyal Singh* and *Ram Lal Singh*. *Sheodyal* died in 1281, F. S. (1873–74), leaving sons and grandsons, who are Defendants in the suit and are now Respondents. *Ram Lal Singh* was the first Defendant. He died after the filing of his written statement in defence, and is now represented by his son *Mahadeo Pershad*, the first Respondent. Both the widows of *Dharam Singh* are dead. *Bhoop Koer*, the Plaintiff's mother, survived *Chowrasq*. The date of her death was disputed, the Defendants alleging that she died about 1865 and relying on the law of limitation. But it has been found by the First Court and the High Court that she died on the 3rd of April, 1875, as alleged by the Plaintiff, and the suit, having been commenced on the 21st of March, 1887, is not barred by the law of limitation.

The Plaintiff claimed as heiress of her father *Dharam Singh*, alleging that he was separate from his nephews, *Sheodyal* and *Ram Lal*, at the time of his death, and that the properties in dispute were his separate properties. The family were admittedly governed by the Mitakshara law, according to which a daughter is entitled in the absence of sons to inherit the separate estate of her father after the death of his widows. As it could not be disputed that *Dharam* and *Ramdyal* were at one time joint in estate, and *Dharam* and his nephews would also be so, the *onus* was upon the Plaintiff to prove that there had been a separation.

J. C.
1894
PRIT KOER
v.
MAHADEO
PERSHAD
SINGH.

The First Subordinate Judge at *Patna* in an able judgment has stated the evidence produced to prove the separation, as well as that upon the question of the date of *Bhoop Koer's* death, and has evidently given a very careful consideration to this evidence. As to the oral evidence, he says that in his opinion the oral evidence on either side was not of much worth, and could not be relied upon unless corroborated by something more reliable; that none of the witnesses appeared to him as truthful or unbiassed; that "they pretended to recollect occurrences which took place upwards of forty years ago, with as much vividness as if they had witnessed them only a few months ago"; and that the question of separation had to be decided mainly upon the documentary evidence. The High Court agreed in this.

The earliest documentary evidence is a bond dated the 15th of September, 1843. It purports to be made by *Dusruth Lal*, mokhtar of *Mussummat Chowraso Koer*, wife of *Dharam Singh*, in favour of *Kanhai Lal*, who was then in possession of *Sherpore*, one of the disputed properties, under a zurpeshgi ijara granted by *Dharam Singh*. The bond alludes to the ijara, and creates a further charge upon *Sherpore* for the money then borrowed. It purports to be signed "*Mussummat Chowraso Koer*, widow of *Babu Dharam Singh*. By the pen of *Sheodyal Singh*," and is witnessed by *Dusruth Lal* and *Sheodyal Singh*. The next document is a zurpeshgi ijara dated the 28th of June, 1844. It purports to be made by "*Dusruth Lal*, mokhtar of *Mussummat Chowraso Koer*, widow of *Babu Dharam Singh*, deceased." It refers to the ijara by *Dharam Singh* and the further charge of the 15th of September, 1843, and to the term of the ijara having expired, and renews it for a further term of three years. This is signed by *Dusruth Lal* only, and has the seal of *Chowraso Koer*. *Sheodyal* neither signs nor witnesses it.

Another document is a judgment of the Additional Principal Sudder Amin of *Patna*, dated the 11th of September, 1844, in a suit by two persons against *Chowraso Koer Sheodyal Singh* and *Ram Lal Singh* and others for a share of the produce of a village in mouzah *Darnara Buzurg*, which was stated in the plaint to have belonged to *Dharam Singh*. In the judgment it is stated that *Chowraso Koer* had filed her answer denying the connection

of *Sheodyal Singh* and *Ram Lal Singh* with the inheritance of *Dharam Singh*, and that *Sheodyal* for himself, and as guardian of his minor brother *Ram Lal*, had personally filed his answer in support of the defence of *Chowraso Koer*, to the effect "That the heir of his uncle *Dharam Singh* is *Mussummat Chowraso Koer*, the widow of *Dharam Singh*, and accordingly suits have been disposed of and are pending from the zillah to the Sudder Court on the establishment of her heirship; and that the Plaintiffs' suit against him, the Defendant, on the allegation of being the heir of *Dharam Singh*, deceased, is wholly an act of selfishness on their part." The order made in the suit is "that the suit be decreed against *Mussummat Chowraso Koer*, and the remaining Defendants be exempted from liability in this case."

Another document is a judgment of the Moonsiff of *Hilsa* of the 23rd of August, 1844, in a suit by one *Fyaz Ali Khan* against *Chowraso Koer Sheodyal Singh* and *Ram Lal Singh*, and others not members of the family, for the recovery of a share of the produce of property in mouzah *Mahomedpore*, said to have been forcibly cut and carried away by a servant of *Dharam Singh* under the orders of him and the other Defendants. The Defendants denied the Plaintiff's title, and said that the land from which the produce was taken was in their mouzah *Mahomedpore*. The Subordinate Judge says this shews that *Chowraso* had some interest in that mouzah. The suit was dismissed on the ground that the Plaintiff had not proved his title, and the question who were the heirs of *Dharam Singh* appears to have been immaterial.

Another document is a decree of the Sudder Court, dated the 14th of September, 1844, in a suit relating to property of considerable value. *Dharam Singh* had instituted a suit to establish his title to it, and had obtained a decree on the 29th of April, 1843 An appeal was preferred against it, and after the death of *Dharam*, *Chowraso Koer* was made Respondent as his representative. The Subordinate Judge says that no attempt was made on the part of *Sheodyal* and *Ram Lal* to have their names substituted for that of *Dharam*, and that they would in all probability have done so if they had been joint with him and had become entitled to the property by right of survivorship. Their Lordships do not see any weight in this, if indeed there is any

J. C.
1894
PRIT KOER
v.
MAHADEO
PERSHAD
SINGH.

such probability. *Ram Lal* was a minor, and *Sheodyal* may have had reasons, other than knowing he had no title, for not becoming a Respondent. If the decree of the 29th of April, 1843, had been reversed he would not have been bound by the decree of the Sudder Court.

In truth, the only documentary evidence of importance is the statement by *Sheodyal* that he and *Ram Lal* were not heirs of *Dharam*. This was made more than forty years ago, and *Sheodyal* being dead, and there being no documentary evidence to explain the statement, reasons for his setting up *Chowraso Koer* as the heiress of *Dharam Singh* can only be suggested. In *Ram Lal's* written statement it is said that the reasons were, the existence of litigations about the time of *Dharam Singh's* death, the indebtedness of *Sheodyal*, and attempts said to have been made by his creditors to sell properties belonging to the family. *Ram Lal* was a minor when the statement was made, and may have known nothing about the matter. *Chowraso Koer* was set up as the sole heiress, which was untrue, *Bhoop Koer* being equally an heiress. The statement was therefore partly untrue, and this suggests that there may have been some reason not now capable of being proved for setting up a sole title in *Chowraso Koer*. The Subordinate Judge thought there were two alternatives: that the assertions of her title by *Chowraso Koer* should be regarded as *bonâ fide* acts, or that they should be regarded "as blinds contrived by *Sheodyal Singh* to deceive the world and conceal his own title." But the assertion of her title by *Chowraso Koer* being partly false makes the *bona fides* of it doubtful. Then, as is observed by the High Court, the fact that there is no evidence of any documents of partition or separation of any kind is of great importance, having regard to the value of the family property, and to the family being obviously one very much versed in the conduct of business affairs. It was clear that on the death of *Doman*, *Dharam* and *Ram Dyal* were joint in estate, and on *Ram Dyal's* death *Dharam* became joint in estate with his nephews. The Plaintiff had to meet the presumption that this continued, and to prove a separation in estate. The documentary evidence—the only reliable evidence in the case—is in their Lordships' opinion insufficient to prove this,

J. C.
1894
PRIT KOER
v.
MAHADEO
PERSHAD
SINGH.

even when considered with the oral evidence of the Plaintiff and her two witnesses, which it is plain the Subordinate Judge thought was of no value. The High Court, on appeal by the Defendants, dismissed the suit, and also dismissed a cross-appeal of the Plaintiff, and their Lordships will humbly advise Her Majesty to affirm the decree of the High Court and dismiss this appeal. The Appellant will pay the costs of it.

Solicitor for Appellant: *J. F. Watkins.*
Solicitors for Respondents: *T. L. Wilson & Co.*

THE BOMBAY BURMAH TRADING CORPORATION, LIMITED . . . . . } DEFENDANT;

AND

SMITH . . . . . PLAINTIFF.

J. C.*
1894
June 19, 20.

ON APPEAL FROM THE HIGH COURT AT BOMBAY.

Construction—Holder of Shares—Terms of Allotment—Extra Dividend.

Where shares in a company had been allotted on terms that the allottee or his executors should receive an extra dividend thereon so long as they should hold them:—

Held, that the extra dividend continued to be payable after the death of the allottee, the shares still standing in his name. The company had no equity to have the estate distributed or the shares appropriated to the parties beneficially entitled, so as to get rid of the condition on which the extra dividend was payable.

APPEAL from a decree of the High Court (Dec. 5, 1892), affirming with some variation a decree of *Farran*, J. (March 11, 1892). The case in the High Court is reported in Ind. L. R. 17 Bomb. 197.

The object of the suit was to obtain a declaration that clause 13 of an agreement dated the 22nd of July, 1864, was still in operation, and that the extra or preferential dividend payable under that clause on certain shares in the Appellant company was still payable and ought to be paid to the Respondent as

* *Present*:—LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, and SIR RICHARD COUCH.

J. C.
1894
BOMBAY BURMAH TRADING CORPORATION v. SMITH.

administrator of the estate of *William Wallace*, deceased, if and when there should be sufficient net profits for that purpose.

The said agreement, and the facts of the case, are sufficiently set out in the judgment of their Lordships.

The judgment of the High Court on the question submitted in appeal was as follows:—

"The question between the parties in this case turns upon the meaning to be given to the expression 'hold' in the 13th article of the agreement, which provides for a preferential dividend being paid to Mr. *Wallace*, his executors and administrators, 'so long as he or they should hold the 100 shares,' which, by the previous article, it had been agreed should be allotted to him, as the consideration for the transfer of the fixed assets. By 'holding' shares, in its ordinary acceptation, is meant being a 'shareholder,' *i.e.*, a person whose name is on the list of shareholders, or at any rate entitled to have his name placed on it; and the language of the latter clause of sect. 13 shews that Mr. *Wallace* 'holding' was regarded as being in that character, without any qualification being annexed to it. As to what is meant by the executors and administrators of Mr. *Wallace* 'holding' the shares, the agreement must be read in connection with the sections of the articles of association of the Defendants' company which relate to the transmission of shares. Those sections are sects. 29, 30, and 31, and provide that the executors and administrators of a deceased shareholder shall be the only persons that the company can recognise as having title to the shares, and that they can be registered as shareholders, or elect to have some person, to be named by them, registered as a transferee of such shares. These articles shew that the executors and administrators, although not entered on the register, are the only persons whose title can be recognised by the company; and as long as that is so between themselves and the company, they would be the 'holders' of the shares in their representative character in the sense that no one else can dispose of them; and there is nothing in this agreement to shew that the executor and administrator were required to make themselves personally liable by having their own name placed on the register. The shares were fully paid up, and they would remain in any case

until transferred by the executors and administrators of Mr. *Wallace*, subject to a lien in respect of all Mr. *Wallace's* obligations. By 'holding,' therefore, in the absence of anything in the agreement to shew a contrary intention must, in our opinion, in the case of the executors and administrators, be understood to be their continuing to be the only persons who could be recognised by the company as having title to the shares, and Mr. *Alexander Falconer Wallace* is still in that position with respect to the shares. It is, however, objected by the Defendant, in his written statement, that it never could have been intended that the executors and administrators should continue to be entitled to the preferential dividend after the debts on the estate of Mr. *Wallace* had been paid, as was admitted to be the case here, and when Mr. *Alexander Falconer Wallace* (the executor who had taken out probate) would, as it was contended, be regarded in a Court of Equity as a trustee for the persons entitled to the shares under the will, viz., for himself and his brother, *Lewis Wallace*. It is not necessary to determine whether Mr. *Alexander Falconer Wallace* would, under the circumstances disclosed by his deposition, be so regarded by a Court of Equity; it is not necessary to determine, as we agree with Mr. Justice *Farran*, that there is nothing to be found in the agreement, express or implied, which shews an intention of the parties to the agreement to regard anything but the legal 'holding' under the articles of association by Mr. *Wallace*, his executors and administrators; and that to go beyond that holding would be virtually to add a new term to the agreement. There are no express words qualifying the 'holding,' and the language throughout the agreement, and especially that of the proviso at the close of article 13, points to Mr. *Wallace* and his legal representatives as the holders of the shares, being the only persons in the contemplation of the parties. Lastly, the very form of the consideration provided by sect. 13 for the transfer of the said assets shews that the object the company had in view was to afford an inducement to *W. Wallace* and his executors to continue on the register, as the holders of the shares. These inferences as to the intention of the parties are entitled to special consideration, from the circumstance that the

J. C.
1894
BOMBAY BURMAH TRADING CORPORATION v. SMITH.

agreement is not an unartificial document, as is so often found in transactions of this nature, but a highly artificial instrument, the work obviously of a skilled draftsman. We are of opinion, therefore, that Mr. *Alexander Falconer Wallace*, by his attorney, the Plaintiff, is still holding the shares within the contemplation of sect. 13 of the agreement; and the Plaintiff is, therefore, entitled to a declaration in the terms of the prayer of his plaint. We do not, however, think it advisable for the Court to express an opinion as to the construction of the expression 'executors and administrators,' a question which may never arise in the future, and is not raised by the pleadings."

Crackanthorpe, Q.C., *Buckley*, Q.C., and *Joyce*, for the Appellant company, contended that the true meaning of clause 13 was this: "So long as you, the allottee, or your executor, on account of your estate, hold the shares, you will have the extra dividend; but when your executor ceases to hold on account of your estate, and holds instead on account of the beneficiaries under the will, who shall have become entitled thereto as part of the administered and distributed estate, he shall not have such extra dividend." It was proved that all the debts and liabilities of the testator had been paid and provided for, that the specific bequest of the shares had been duly assented to by the only proving executor, and that the estate ought to be wound up and distributed, and the parties beneficially entitled placed upon the register in their own right, in which case it could not be contended that they were entitled to the extra dividend. "Holding" the shares was the condition on which the extra dividend was payable; otherwise the extra dividend would be payable for ever. That condition was no longer satisfied. *Wallace* was dead; his executors were not on the register, and were not entitled to be placed thereon after the estate was, as it ought to be, distributed.

[Reference was made to *Dix* v. *Burford* (1)]

Sir *Richard Webster*, Q.C., *Cozens-Hardy*, Q.C., and *Methold*, for the Respondent, were not heard.

(1) 19 Beav. 409.

1894. June 20. The judgment of their Lordships was delivered by

LORD MACNAGHTEN:—

This appeal raises a question as to the meaning and effect of a provision contained in an agreement of purchase and sale which was made between the Appellants and the late Mr. *William Wallace* in 1864. The question relates to the continuance of a special or extra dividend attached to certain shares, part of the consideration for the purchase.

Mr. *Wallace* was the possessor of an extensive and valuable business as a timber merchant in *Burmah*. In 1863, under the *Limited Liability Act* then in force in *Bombay* (Act XIX. of 1857), a joint stock company, which is now called the *Bombay Burmah Trading Corporation, Limited*, was formed for the purpose of taking over Mr. *Wallace's* business.

The company was registered with a nominal capital of 25 lacs, divided into 1000 shares of Rs.2500 each.

The company's articles of association, printed in the Record, contain two regulations which it will be convenient to notice in passing. Article 9 gives the company a lien on all the shares of every shareholder for all the debts, liabilities, and engagements of such shareholder. Article 29 provides, in common form, that the executors and administrators of a deceased shareholder shall be the only persons recognised by the company as having any title to his shares, but it requires, as a condition precedent to recognition, the production of probate or letters of administration granted by the High Court of *Bombay*. It was suggested, in the course of the argument before this Board, that article 9 was not in existence when the purchase agreement was made. That objection comes rather late; in the Courts below the case was argued on the footing that the articles printed in the Record were the relevant articles of the company. Nor, indeed, is the objection one of substance. It was part of the arrangement expressed in the agreement itself that the company should alter or modify their existing articles as they might be advised for the purpose of carrying out the agreement. It matters little whether the article in question was introduced

J. C.
1894
BOMBAY BURMAH TRADING CORPORATION v. SMITH.

for the very purpose of the agreement, or contained in the articles of association as originally framed.

The terms and conditions of the transfer of the business to the company are to be found in an agreement dated the 22nd of July, 1864, which was ratified and adopted by the company in general meeting and carried into effect. The agreement is expressed to be made by Mr. *Wallace* of the first part, and five gentlemen, directors of the company, of the second part. Mr. *Wallace*, it seems, had concessions from the British Government; he had concessions from the King of *Burmah*; he had forest rights, saw-mills, a large establishment and staff of workmen, ships under charter, and a number of pending contracts. The agreement was made on the faith of certain representations by Mr. *Wallace* as to the value of his business, and the nature and circumstances of the property which he proposed to hand over. After setting out these representations somewhat in detail, the agreement proceeds as follows:—"And whereas the said parties hereto of the second part have made such enquiries as were in their power with regard to the said representations and so far as such enquiries extended the said representations appeared to be correct but as to many of the matters about which the said representations were concerned the said parties hereto of the second part have been obliged to rely on such representations alone it being of great consequence for the interests as well of the said company as of the said *William Wallace* that some binding arrangement should be made with the least possible delay And whereas it was considered by the said parties hereto that having regard to the great difficulty of estimating the value of the said forest operations rights and grants of the said *William Wallace* and of the said trained establishment and goodwill the interests as well of the company as of the said *William Wallace* would be best consulted by entering into the arrangement hereinafter in clause 13 contained." Then clause 12 provided that in consideration of the transfer of certain property, referred to as "the fixed assets," Mr. *Wallace* should be entitled to have allotted to him 100 shares in the company of Rs.2500 each, but at the same time it declared that the company should not be bound to give

their consent to or recognise as valid any assignment of the said 100 shares, or any of them, during a period of five years from the date of the registration of the company.

Clause 13, so far as material, is in these terms: "In consideration of the transfer by the said *William Wallace* to the company of the premises hereby agreed to be transferred (other than the said fixed assets and other than the premises mentioned in the clauses six seven and nine)"—those premises consisted of timber already cut, live stock, stores, and plant—"the said *William Wallace* his executors or administrators shall be entitled so long as he or they shall hold the said one hundred shares to an extra or preferential dividend equal to one-third of such surplus net profits of the company as may remain in any year after paying a dividend at the rate of twelve per cent. per annum on the paid up amount of all shares in the company (including the said one hundred shares) and after setting apart from time to time out of such surplus profits as a reserved fund or to the credit of any reserved fund already created such sum as the directors of the company for the time being may in their discretion think fit."

That is a provision, not unintelligible and not unreasonable, by which, as the agreement states on the face of it, the interests of the purchasers as well as the interests of Mr. *Wallace* were intended to be consulted. Mr. *Wallace* was to receive payment for the goodwill of his business out of future profits, and in proportion to the amount of those profits. He would be paid handsomely if his representations proved correct. If they turned out to be incorrect it would be an advantage to the company to keep Mr. *Wallace's* name on the register, and to keep within their reach the shares which represented the purchase-money. It must have been obvious to both parties to the agreement that it was not unlikely to lead to difficulties and complications which might last for an indefinite time. It was therefore of importance to the company to have Mr. *Wallace* as a member, and to keep their hold on Mr. *Wallace's* shares for as long a time as possible. They were not bound to allow a transfer of his shares for five years; after that period they trusted, it seems, to the influence and operation of the inducement held out in the shape of an

J. C.
1894
BOMBAY BURMAH TRADING CORPORATION v. SMITH.

extra dividend, leaving the duration of the arrangement to depend on the course of events.

Mr. *Wallace* is now dead. He died on the 28th of June, 1888. He left a will naming executors, two of whom survived him. His will has been proved in *England* by one of the executors. As the attorney of that executor, Mr. *Smith*, the Plaintiff and Respondent in this case, has obtained a grant of letters of administration, with the will annexed, from the High Court at *Bombay*. The letters of administration have been produced to the company, and they have recognised the title of the administrator by noting the letters of administration in the share register. The shares still stand in the name of Mr. *Wallace*; but it is not disputed, if it was not actually admitted, that all the testator's debts have been paid or satisfied.

The only question, if there be a question, is whether in these circumstances the extra dividend still continues to be payable. The Appellants contend that the extra dividend is not payable now because there is nobody who can be said to hold Mr. *Wallace's* shares. Mr. *Wallace*, they say, does not hold them, because he is dead; his executors do not hold them, because their names are not on the register. But then who does hold them? Certainly, no one else. And why are the shares not held by Mr. *Wallace* or his executors or administrators? There is no magic in the word "hold." Mr. *Wallace's* name is on the register. The company cannot remove it. As long as it is there the company are bound to credit the proper dividends to his holding, and to recognise the title of his legal personal representatives to receive any dividends which may be carried to his credit.

It was urged on behalf of the company that Mr. *Wallace's* estate ought to be wound up and distributed, and that some person ought to be put on the register in his own right; and they complain that if the Respondent's contention is correct this extra dividend may go on for ever. The contention of the company is a singular one, and the complaint they make is no less singular. They complain that the attraction which they themselves held out is attractive still—only too attractive. They think it a hardship that the arrangement should continue when

once it has served their purpose. But it must be remembered that the scheme had a twofold object. It was designed for the protection of the company; it was also intended as a mode of payment for the goodwill. Why is the payment for goodwill to stop because Mr. *Wallace's* representations have proved correct, and the provision is no longer needed for the protection of the company?

But, say the company, if the executors would only do their duty to their beneficiaries under the will, or if the beneficiaries would kindly insist on their rights, the arrangement would come to an end, because the estate would be distributed, and the shares would be appropriated to persons beneficially entitled. What have the Appellants to do with that? Naturally the beneficiaries are content with things as they are. How can the company avail themselves of any equities which the beneficiaries may have as between themselves and their trustees? The company are only concerned with the legal title to the shares; the legal title is that of Mr. *Wallace*, deceased; and his legal personal representatives are entitled to whatever may be payable in respect of his shares.

Their Lordships think that according to the true meaning of clause 13, and the very letter of its terms, the shares in question are held by Mr. *Wallace*, or his executors or administrators. They will, therefore, humbly advise Her Majesty that this appeal should be dismissed.

The Appellants will pay the costs of the appeal.

Solicitor for the Appellant: *E. F. Turner.*

Solicitors for the Respondent: *Budd, Johnsons, & Jecks.*

J. C.*
1894
June 15, 19; July 14.

DEO KUAR . . . . . PLAINTIFF;

AND

MAN KUAR . . . . . DEFENDANT.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Gift by Hindu Widow—Onus Probandi—Pensions Act, 1871—*Suit to recover Malikana.*

To establish a gift from a Hindu widow, the *onus* is on the donee to shew that the widow, knowing her rights and knowing that she was making a free gift, did so make it.

Where in a suit by a Hindu widow to obtain possession of a moiety of her husband's estate, it was contended that under a family arrangement, resulting from a long series of transactions between the Plaintiff, the mother of the Plaintiff's husband, and the Defendant, the widow of that husband's predeceased son, the Defendant was legally entitled to such moiety :—

Held, overruling the High Court, that such transactions, which included mutation of names, an alleged award, a partition, several years' possession by the Defendant, and exercise of proprietary rights by her, failed to prove any intention on the part of the Plaintiff to transfer title to the Defendant.

So far as the suit related to a share of malikana granted by the Government in lieu of relinquished proprietary right, *held* that under the *Pensions Act*, 1871, it was not cognisable by the Court, no certificate having been obtained by the Plaintiff under the Act.

APPEAL from a decree of the High Court (June 25, 1889) reversing a decree of the Subordinate Judge of *Banda* (March 29, 1888).

The question raised in appeal was whether the Appellant was, in the circumstances stated in their Lordships' judgment, entitled to a decree for possession of the property in suit with mesne profits.

The first Court held that the Appellant was entitled to succeed as heiress of her husband, and that she was not bound by an award of certain arbitrators made in October, 1877, under which the Respondent had obtained his possession.

The High Court reversed this decision, and held that the Appellant had failed to make out her case. It discussed the

* *Present* :—LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, and SIR RICHARD COUCH.

transactions between the parties, under which the Respondent had obtained mutation of names, and the share of the property of which she had had possession for nine years. The Court found :—

"So far from the Plaintiff having made out in this suit a case of fraud or concealment, we are satisfied that she was thoroughly acquainted from the first with what was being done, and the arrangement was an arrangement carried out in the way of an award in accordance with the wishes of the three ladies as the settlement of their respective claims to the estate."

The conclusion arrived at by the High Court, upon the whole of the evidence in the case, was expressed as follows :—

"As we have said, we are satisfied on a careful perusal of all the evidence which has been put before us on the one side, and on the other, that the Plaintiff was an assenting party to the arrangement which finally resulted in the mutation of names and in the Defendant obtaining the property which is claimed from her in this suit. We are also satisfied that the Plaintiff has entirely failed to make out the case on which she came into Court; that there is no ground for believing that she has been in any way defrauded; that the arrangement which was come to was in truth a family arrangement in settlement of the contentions between the ladies. Even if we were to believe—which we do not—that she first became aware of the true nature of what had taken place in 1882, the time which she allowed to elapse before coming with this action on the 19th of April, 1886, is unexplained."

Branson, and *Raikes*, for the Appellant, contended that the Appellant, being entitled by the Hindu law of inheritance to the entirety of her husband's estate, must be shewn by satisfactory evidence to have conveyed to the Respondent the moiety which she claimed. The Appellant was a purdahnashin, and a transaction by which she was alleged to have parted with half of her property to the Respondent without consideration and without legal advice could not be supported. The evidence did not shew that she even purported to assent to such an arrangement, still less that she actually did so, well knowing her rights and what she was doing, with the intention of transferring her estate. As

J. C.
1894
DEO KUAR
v.
MAN KUAR.

regards the award relied upon, it was not an award at all, but merely an embodiment of the wishes of the Appellant's mother-in-law, who had no legal rights in the property in suit. Even if it had been an award, it was never acted on. With regard to the claim for malikana having been disallowed, objection to its disallowance had been made under sect. 561 of the Civil Procedure Code on the Respondent's appeal to the High Court. Reference was made to the *Pensions Act*, 1871, and it was contended that malikana did not come within its provisions, and that therefore no certificate was necessary.

Mayne, and *Ross*, for the Respondent, contended that the *onus* was upon the Appellant to prove her case. She alleged that the Respondent was placed in possession of the property in suit without her knowledge and by fraud. The evidence, on the other hand, shewed that she was an assenting party to the award, to the family arrangement, and to the series of transactions which evidenced that arrangement. Moreover, a partition had been come to under the award with the Appellant's knowledge. The evidence shewed that she knew her rights, and was aware of everything which took place. She was willing and knowingly intended to cede to the Respondent her own right of management and possession. It was neither proved nor alleged that she had any intention to waive or affect the rights of her son; nor could the transaction—which, it was submitted, was reasonable and right as between the widows—prejudice in any way her son's claims as reversioner. It was not contended that there was or could have been a gift out and out of absolute proprietary right; but the evidence shewed a mutual arrangement under which the Respondent was to have for life possession and control of a moiety of the estate.

Branson, replied.

1894
July 14.

The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

This is a family dispute. The Defendant, who is the present Respondent, has been placed in possession of half the family

property; and the Plaintiff, who is Appellant, and who is in possession of the other half, claims the whole. The family whose property is in question were Gujrati Banias, who some time back migrated from *Baroda* to *Banda*, but retained some property in *Banda*, and had relatives there. They were a joint Hindoo family subject to the law of the Mitakshara. In the year 1868 *Pransukh Ram*, the then head of the family, died at *Banda*. He left surviving him his widow *Jarao Bai*, and one son *Uttam Ram*, and two daughters. He had another son *Ganga Ram*, who predeceased him, leaving no issue. *Uttam Ram*, who took the whole inheritance, died on the 30th of October, 1875, leaving no male issue. The Plaintiff is his widow. The Defendant is the widow of *Ganga Ram*.

There is now no question but that on *Uttam Ram's* death the whole inheritance devolved on the Plaintiff. She then thought she was pregnant and might have a son, but those hopes were delusive. In this suit it has been contended that the Defendant was entitled to share in the inheritance on the ground of some local or caste custom applying to the family; but it has been found that there is no such custom, and there is no evidence that the Plaintiff's right to inherit was ever seriously brought into question prior to this suit.

The Plaintiff's claim is denied, and the Defendant's title is rested, on the ground that, by a long series of transactions which will be passed in review, the Plaintiff transferred to the Defendant a moiety of the Plaintiff's property. The Subordinate Judge held that there was no such transfer, and gave the Plaintiff a decree. The High Court thought differently, and dismissed the suit. From that decree the Plaintiff now appeals.

The first transaction is an application by *Jarao*, the widow of *Pransukh* and the mother of *Uttam*, made on the 20th of December, 1875, to have her name substituted for that of her son in the settlement records. The evidence of the proceedings on this application is contained in the recitals to an order dated the 25th of November, 1876, relating to the lumbardarship of one of *Uttam's* mouzahs.

It appears that the Plaintiff was then in the family house at *Barnagar* in *Baroda*, and that the presiding Settlement Officer

J. C.
1894
DEO KUAR
v.
MAN KUAR.

communicated with her through the British Agent at *Baroda*. On the 12th of June, 1876, the Settlement Officer received a letter from the Agent as follows:—

"I send herewith the original deposition, in Gujrati, of *Mussammat Diwali Bai*, widow of *Uttam Ram*, with an English translation thereof. She has given her consent to the entry of the name of the mother of *Uttam Ram* in the settlement papers in place of her deceased son, on the following conditions: 'I am with child, in the first place. In the event of a son being born his name shall be entered as the heir to the estate of *Uttam Ram*; secondly, if a son be not born my name shall be entered after the death of the mother of *Uttam Ram*.'"

Upon that he delivered the following opinion:—

"As *Diwali Bai*, the widow of *Uttam Ram*, deceased, does not relinquish her right, it appears necessary that the names of both the *Mussammats*, with a detail of their shares, be entered; but by way of precaution it may be ascertained from the Collector if there is any harm, in his opinion, in entering the names of both the *Mussammats*. It is clearly to be stated that the whole management will rest with the mother of *Uttam Ram*. By the time the papers are prepared it will have been ascertained whether *Mussammat Diwali Bai* has given birth to a son."

On the 20th of June, 1876, the Collector sent an answer of a very extraordinary character. He said that in his opinion there was no harm in entering the names of *Jarao* and also that of the Defendant. Why the Collector took upon himself to introduce, quite gratuitously it seems, the name of the Defendant, is nowhere explained. It appears to have been the beginning of a series of errors.

The Settlement Officer indeed acted correctly, for on the 4th of July he directed that the office should make an entry of names according to the order of the 12th of June. But the case was transferred to the Settlement Court of *Banda*, when the following proceeding took place, apparently on the 12th of August:—

"*Mussammat Jarao Bai*, the mother of *Seth Uttam Ram* deceased, presented a petition to the Settlement Officer for the

entry of her name alone in place of *Seth Uttam Ram.* The order passed thereon was that there were three heirs to this estate, viz.—(1.) *Mussammat Jarao Bai,* the widow of *Pransukh Ram* deceased; (2.) *Diwali Bai,* the widow of *Uttam Ram* deceased; and (3.) *Mussammat Banke Bai,* widow of *Ganga Ram* deceased; and that therefore it was expedient to enter the names of all the three with this condition, that the management of the whole estate should be entrusted to *Mussammat Jarao Bai* for her life, and that when a new khewat would be prepared the names should be entered according to this order in equal shares."

In this way it seems that the Revenue Court, misled by the Collector's letter, gave the Defendant a position to which she had no right, which was not conceded to her by the Plaintiff, and was not demanded either by herself or by *Jarao* on her behalf.

The order of the 25th of November, 1876, in the preamble of which the above-stated proceedings, and some subsequent proceedings in September and November, are narrated, was made for the purpose of settling a dispute in the mouzah of *Jeorahi.* The question was whether one *Bhura,* a shareholder, or the heirs of *Uttam* should be entered as lumbardar. The Settlement Deputy Collector decided in favour of the heirs; in entering the heirs he followed the error of the order of August. In his judgment he states that the heirs are the three widows, and in his order he directs that their names should be entered in equal shares with the following conditions:—

"That the whole management of the estate will be entrusted to *Mussammat Jarao Bai* during her lifetime, and that in the event of a son being born to *Mussammat Diwali Bai,* who was with child at the time of the death of *Seth Uttam Ram,* the name of the son would be entered as successor to *Seth Uttam Ram* deceased, in respect of the property."

It is not clear upon the record in how many of *Uttam Ram's* mouzahs, twenty-six in all, the above procedure was followed when the names were changed. It would seem that in some the name of *Jarao* alone was entered; in some—the plaint says three—the names of *Jarao* and the Plaintiff; and in some, as in *Jeorahi,*

J. C.
1894
DEO KUAR
v.
MAN KUAR.

the three names. That inquiry is not now of importance. The point is that the true heir, the Plaintiff, was not in any case entered in lieu of *Uttam*. There is nothing to shew that she knew her rights or received any independent advice. But even if she did know what she was doing when she made her deposition in May, 1876, the orders of August and November, 1876, were wholly at variance with her intentions as expressed in that deposition, and with the directions of the Settlement Officer made upon it on the 12th of June and the 4th of July. It is in the opinion of their Lordships beyond doubt that at this time the Plaintiff might have maintained a suit for the correction of the records by the insertion of her own name as sole heir.

The next stage in the transactions took place during the year 1877, and is quite as extraordinary as the first stage. It terminated in a document dated the 9th of October, 1877, purporting to be an award of arbitration by *Seth Kishan Chand* and *Lachhman Shankar Bhat;* but the circumstances which led up to this award are left in deep obscurity. The arbitrators recite that the three widows have appointed them "for the settlement of their respective contentions in respect of the right of ownership" over *Uttam's* property. But they do not settle any such contention, nor do they intimate what contentions there were. They recite thus:—

"*Mussammat Jarao Bai* was asked by us in what manner she wished the partition to be made; to which she replied that she wished *Mahal Pransukh Ram*, situated in mauza *Chhanon* pargana *Sihonda*, to be given to her for her maintenance, and that as regards the remaining zemindari villages and property and chattels held in common, she wished that they should be divided in two equal shares, and one-half given to each of her two daughters-in-law, and that this course would be agreeable to her."

And then they go on to express *Jarao's* wishes in the form of an award; directing as to most of the mouzahs that they shall be held by the two younger widows in equal moieties, and as to some giving them to one or to the other in entirety, but so as to give about the same value to each.

The agreement to refer has not been proved. A copy was tendered, but rejected by both Courts. Both the arbitrators have given evidence in the suit, apparently with great candour. Neither of them mentions what the point of dispute was. According to both, the award originated with *Jarao*. Neither of them had any communication with the two younger widows about the award, either before it or after. *Kishan Chand* says: "As to the arbitration I had asked *Jarao Bai* what was the award to be"; and then he did as she bid him. *Lachmi Shankar* says: "We, the arbitrators, did not make the award according to our own judgment. We made the award as asked by *Jarao Bai*." It is obvious that such a proceeding is not an award at all, but is entirely devoid of legal effect, as it was treated by the Subordinate Judge. The right which the Plaintiff had to sue for her inheritance prior to the award remained to her undiminished by the award.

It is not indeed contended by the Defendant's counsel that the award by itself can have any legal effect. Nor do their Lordships understand that the learned Judges of the High Court so treated it, though they lay a good deal of stress upon it. They hold that there was "a family arrangement in settlement of the contentions between the ladies," and that this arrangement was "carried out in the way of an award in accordance with the wishes of the three ladies as to the settlement of their respective claims to the estate." That seems quite a legitimate use to make of the award, if only the evidence supports it.

But first, their Lordships cannot find what contentions or claims there were to be settled. They pressed the Defendant's counsel on this point, and he could not point out any indication of any such contention or claim except the general statement in the award itself. What the evidence shews is that there was personal friction between the two younger widows, which they palliated by setting up separate domestic arrangements, but which the division of *Uttam's* property had no tendency to allay. They were not less likely, perhaps more likely, to fall out in taking accounts of the shares due to each, than in settling the maintenance to which the Defendant was entitled. And

J. C.
1894
DEO KUAR
v.
MAN KUAR.

secondly, there is no evidence to connect the award with the wishes of the three ladies. It embodied the wishes of *Jarao*. But we know nothing of the Plaintiff's wishes except by her deposition of May, 1876, and that gives no countenance to the award.

In opening the Defendant's case Mr. *Mayne* frankly admitted that there was no award in any legal sense, and that he could not find any consideration passing from the Defendant to the Plaintiff so as to support his client's case on the ground of contract. But he contended that the whole series of transactions between *Uttam's* death and the institution of this suit, of which the award is an important item, supports the conclusion that for some motive or other the Plaintiff deliberately intended that her sister-in-law should have an equal share in the property. And he subjected the whole evidence to a very careful examination to prove that point. That in effect puts the Defendant's case on the footing of a free gift by the Plaintiff, and Mr. *Mayne* accepted that issue. This is not the issue raised by the pleadings, nor the issue presented to the Subordinate Judge; but, as it may have been in the mind of the High Court, their Lordships have considered this view of the evidence. In order to succeed upon it the Defendant must shew that the Plaintiff, knowing her rights and knowing that she was making a free gift to her sister-in-law, did so make it.

Their Lordships have already shewn that prior to the award the evidence is not favourable, but adverse, to the theory of such a gift. The award itself adds to the adverse evidence; for if the Plaintiff wished to make a gift, why should *Jarao* set up the fictitious machinery of an arbitration? If their Lordships are to find evidence for a gift, they must find it in circumstances subsequent to the award. And that brings us to the third stage of the history.

On the 13th of November, 1877, *Jarao* died. During her life no mutation of names was made in pursuance of the award; but that period was so short that no importance can be attached to the omission. On the 25th of November the karinda of *Jarao* applied to the Settlement Court stating that she was the zemindar of mouzah *Malathu*, one of *Uttam's* mouzahs, and that the Plaintiff

and Defendant were the heirs; and he asked that their names should be entered in lieu of hers as mortgagees of a large number of parcels. That mutation was ordered accordingly—"by right of inheritance," as the order expresses it. On the 7th of December, 1877, one *Khan Muhammad*, calling himself karinda and mukhtar of the two widows, applied for mutation of names in *Semaria*, another of *Uttam's* mouzahs. He puts into their mouths the statement that *Jarao* was proprietor and owner of the entire 16 annas, and that her daughters-in-law are her heirs. Similar applications were made in other mouzahs by other karindas. So far as they are given in the Record they are to the same effect as the two just stated. The result of the evidence is that the names of the Plaintiff and Defendant came to be entered jointly in respect of the properties now sued for, within a few months of *Jarao's* death, on the statement that she was the owner and that they were her heirs.

Pausing again, we may ask how the mutations of names in 1878 support the theory of a gift by the Plaintiff, or, if it is preferred so to put it, of the existence of wishes on the part of the three widows which the award correctly expressed. The answer is, that the mutations are not in accordance with the award, and instead of supporting it throw discredit on it.

Take, for instance, mouzah *Baragaon*, which is one of those now held in moieties, and is put in suit accordingly, but the award gives it to the Plaintiff in entirety. So mouzah *Keri* was awarded to the Defendant in entirety, but is held in moieties. There is at least one other mouzah in the same position, probably more, but it is not easy to trace the whole list.

Independently of those variations, not material as regards value, but material as shewing that it was not the award which the agents of the parties took for their guide, the whole claim for the mutations of 1878 was founded on statements which differ as widely from the award as they do from the truth. The statement that *Jarao* was owner and proprietor contradicts everything that preceded it. By the Plaintiff's consent in 1876 *Jarao* was let in to be joint owner and manager; possibly for such an interest as would be ascribed to the widow of *Pransukh* if he had died without male issue. By the award she took no interest

J. C.
1894
DEO KUAR
v.
MAN KUAR.

in any part of the property except in one mouzah for life. *Lachmi Shankar* is quite right in saying, "The arbitration-award was not acted upon. Mutation of names was not made according to it . . . the names of *Man Kuar* and *Deo Kuar* were entered in respect of equal shares by right of inheritance. The names were entered by right of inheritance from *Jarao Bai*."

Now those who allege that a gift is to be inferred from a series of transactions should be able to shew a reasonable amount of consistency in the transactions on which they rely. We have seen that the mutations of 1876 were contrary to the Plaintiff's wishes expressed in her deposition of that year, and that the award was equally contrary to the deposition and to the mutations of 1876. Now it appears that the mutations of 1878 were just as contrary to the deposition and to the former mutations, and to the award. So far the evidence appears to their Lordships to be destructive of the theory now put forward on behalf of the Defendant.

An attempt is made to support the award or the arrangement expressed in it by shewing that *Chunni*, a daughter of *Jarao*, who was awarded an annuity of Rs.50, sued the Plaintiff and Defendant for it, and got a decree. But supposing those proceedings to be evidence in this suit, the answer is that the suit was undefended and the decree made *ex parte*, and there is neither proof nor probability that the Plaintiff knew anything about them. *Lachmi Shankar*, who acted for her, says that he did not tell her about the suit. He adds, "all the suits were brought in consultation with me and *Gobind Das*. It was a work connected with the shop. There was no occasion to refer to *Deo Kuar* and *Man Kuar*." The same kind of observation applies with nearly as much force to the two documents filed in the Tehsildar's Court in 1880. One is said to bear the Plaintiff's mark, the other her full signature. But no proof is offered that any explanation of the documents was given to her, or that she gave any intelligent assent to them. The Subordinate Judge observes of all this class of evidence that the whole affair is the work of agents and mokhtars, and that no care appears to have been taken such as the law requires in the case of purda-nashin

ladies. Their Lordships think that those remarks are justified by the evidence.

Great reliance has been placed upon the fact that in the year 1878 a partition was effected, through a punchayet acting on behalf of the two younger widows, of a family house and some chattels in *Barnagar*. This operation, it is argued, is exactly in accord with the doings in *Banda*—and not only so, but by the farkhati, or deed of release made between the parties, the partition in *Banda* is expressly affirmed. Certainly if all this was brought home to the Plaintiff, and it were shewn that with full information and intelligence she authorized such a partition and signed such a deed, it would tell for the Defendant. But there is no evidence to that effect. The Plaintiff's name was signed by one of her uncles; and the deed of release sets out with a serious misstatement. The property is represented as that of *Pransukh*, who stood in an equal relation to his two daughters-in-law. But it was in fact the property of *Uttam*, the Plaintiff's husband. Whatever may be the local customs of *Baroda* (and none are proved) it is impossible to suppose that the descent from *Pransukh* to *Uttam* ought to be passed over in silence, or that the Plaintiff understood her true position. Indeed it is a most remarkable phenomenon in this case, that wherever we come across statements or entries referring to title they are based on error. Their Lordships are of opinion that the *Barnagar* transactions are of very little, if any, help to the Defendant's case.

The real strength of her case is her possession, which appears to have continued for about eight years before suit. It is not long enough to afford a defence by mere lapse of time. It is one of the circumstances to be taken into consideration in estimating the theory of the Plaintiff's wish to make a gift to her sister-in-law: a very important one doubtless, and such as might reasonably incline a Court of Justice in the Defendant's favour if the prior history of the case was in her favour. But their Lordships have shewn reasons for concluding that the prior transactions are not only not favourable, but are decidedly adverse to the Defendant. In their judgment the evidence shews that, either from the influence of *Jarao*, or from carelessness

J. C.
1894.
DEO KUAR
v.
MAN KUAR.

or mistakes on the part of officials and of family agents, a number of unwarrantable liberties were taken with the Plaintiff's name and interests; and that the Defendant thereby gained a position to which she was not entitled. It is clear to them that, at least as recently as the mutations of 1878, the Plaintiff might have sued to have her property restored to her, and that to such a suit there could have been no substantial defence. Her inaction is not explained except by her statement in the plaint that she had only then discovered what had been done. Very likely that is an exaggerated statement of her ignorance. But even supposing that she learned the Defendant's position in the course of 1878, and that she was supine for eight years, that is no sufficient reason for imputing to her wishes and intentions which all the other circumstances of the case contradict.

There is a minor point respecting the malikana of mouzah *Pachanahi*, which amounts to Rs.1500 per annum. As between the Plaintiff and Defendant, it stands in exactly the same position as the other property, but the Subordinate Judge considered that the jurisdiction of the Civil Court is taken away by the *Pensions Act*, 1871. The Plaintiff made it the subject of appeal to the High Court, but of course it was there merged in the larger issue decided adversely to her. She has raised the question again on this appeal. Mr. *Mayne* declined to argue it on the Defendant's behalf. Mr. *Branson* submitted rather than argued it on behalf of the Plaintiff; but he cited no authority, and their Lordships have not been able to find any bearing directly upon the subject.

The *Pensions Act*, 1871, enacts that "Except as hereinafter provided, no Civil Court shall entertain any suit relating to any pension or grant of money or land-revenue conferred or made by the British or any former Government, whatever may have been the consideration for any such pension or grant, and whatever may have been the nature of the payment, claim or right for which such pension or grant may have been substituted." The expression "grant of money or land-revenue" is interpreted to include anything payable on the part of Government in respect of any right, privilege, perquisite, or office.

Mouzah *Pachanahi* was taken into the hands of the Government and held khas in or before the year 1880, and by a deed dated in September of that year the Plaintiff and Defendant formally made over to Government their proprietary rights on consideration of receiving Rs.2000 per annum as malikana in perpetuity. Malikana is the allowance made to proprietors so dispossessed. By Regulation VII. of 1822 it might vary from 5 to 10 per cent. of the income realized. That regulation was repealed as regards the North-West Provinces by Act XIX. of 1873, and fresh provisions for allowances to dispossessed proprietors were substituted. It does not appear under what circumstances the mouzah was taken into khas management, but it cannot be doubted that the allowance stipulated for and granted was of the nature indicated by the term malikana, *i.e.*, a grant of a portion of the revenue in lieu of pre-existing proprietary rights.

It is at first somewhat surprising that a property which has been the subject of bargain and of formal grant should be excluded from the cognizance of Civil Courts. But it cannot be denied that it falls within the literal construction of the words of the *Pensions Act*, *i.e.*, it is something payable on the part of Government in respect of a right. And the decision of this Committee in *Vasudev Sadashiv Modak* v. *Collector of Ratnagiri* (1), and again in *Maharaval Mohansingji Jeysingji* v. *Government of Bombay* (2), shews that the language of the Act applies to cases in which the grant has been made in consideration of prior rights vested in the grantee. In the former case the subject of the suit was a grant made by the Peishwa to an hereditary deshmukh authorizing him to levy dues from the ryots, which dues were subsequently collected by the British Government and paid over to the deshmukh. In the latter case the subject was a *to da garas hukk*, which, though originating in blackmail, had long been recognised as property capable of alienation and of seizure and sale in execution; and the liability for which had been assumed by the British Government In both cases it was held both by the Courts below and by this Committee that the Civil Courts were incapacitated by the *Pensions*

(1) Law Rep. 4 Ind. Ap. 119. (2) Law Rep. 8 Ind. Ap. 77.

J. C.
1894
DEO KUAR
v.
MAN KUAR.

Act from entertaining suits. It is not for their Lordships to examine into the relations between the Government, the farmers, the ryots, and the grantees of malikana, or the previous state of the law, or the other considerations which may have dictated the policy of the *Pensions Act*. It is enough if its effect is expressed in clear terms. The Plaintiff might have applied for a certificate which would have enabled the Court to make some declaration of right as between her and the Defendant, but she did not do so, and must submit to the disability which the Act imposes upon the Court.

The Plaintiff fails to get the decree of the Subordinate Judge altered in her favour in this respect; but it does not appear that her claim to do so has had any effect on the costs of this appeal. Their Lordships will humbly advise Her Majesty to discharge the decree of the High Court, except in so far as it disallows with costs the objections of the Plaintiff to the decree of the Subordinate Judge; to dismiss the Defendant's appeal to the High Court with costs; and to restore the decree of the Subordinate Judge. The Defendant must also pay the costs of this appeal.

Solicitor for Appellant: *T. C. Summerhays.*
Solicitors for Respondent: *Barrow & Rogers.*

UMRAO BEGAM . . . . . APPELLANT;

AND

IRSHAD HUSAIN AND ANOTHER. . . . RESPONDENTS.

J. C.*
1894
June 7, 30.

ON APPEAL FROM THE JUDICIAL COMMISSIONERS OF OUDH.

Oudh Estates Act, s. 22, sub-s. 4—Talookdar's Daughter's Son treated in all respects as a son—Special Leave to revive an Appeal.

Held, that the question whether a talookdar's daughter's son has been treated in all respects as his own within the meaning of sect. 22, sub-sect. 4, of *Oudh Estates Act*, 1869, is one of fact to be tried and determined by the same method as other questions of fact; and no test for such a question can be laid down in terms less wide than those of the Act.

Pertab Narain Singh v. *Subhao Kooer* (1) considered.

Where by consent special leave was given that an appeal by a person in the line of succession prescribed by the Act should be revived by a more remote claimant thereunder, such revived appeal was held to be limited to the claim governed by the Act.

APPEAL from a decree of the Judicial Commissioner of *Oudh* (March 21, 1888) affirming a decree of the District Judge of *Lucknow* (April 25, 1887).

The suit was brought by *Ahmadi Begam*, as widow of the late talookdar of *Narauli*, to recover the talooks and other property of the deceased. The first Defendant, *Sajjad Husain*, resisted the decree on the ground that he was the daughter's son of the late talookdar, and had been treated by him in all respects as his son so as to entitle him to succeed before the widow under the *Oudh Estates Act* (I. of 1869), s. 22, sub-s. 4. *Sajjad Husain* died and was represented by the Respondent *Irshad Husain*, his younger brother.

After decree *Ahmadi Begam* died, and *Umrao Begam*, her co-wife's daughter, petitioned the Judicial Commissioner to revive a pending appeal to Her Majesty in Council. The Judicial Commissioner refused on the ground that *Ahmadi Begam* only claimed a life estate in the talook, and that *Umrao's* claim did

* *Present*:—LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, and SIR RICHARD COUCH.

(1) Law Rep. 4 Ind. Ap. 228.

J. C.
1894
UMRAO BEGAM v. IRSHAD HUSAIN.

not arise as representing *Ahmadi*, but under an independent title (if any) based on sect. 22, sub-sect. 11. Special leave was granted by Her Majesty on the 5th of August, 1892, to *Umrao Begam* to carry on the appeal, on the ground that she, as the next in the order of the line of heirs prescribed by sect. 22 who were excluded by the decree in favour of *Sajjad Husain*, was entitled to appeal against it.

The facts of the case are stated in the judgment of their Lordships.

Finlay, Q.C., and *Mayne*, for the Appellant, contended that the concurrent findings of fact by the Courts below could not be accepted as conclusive in this case, because, assuming the correctness of the evidence given, it was not sufficient in law to create a preferential title under clause 4 of sect. 22. The District Judge dealt with the evidence, which related to a child only five years old at the talookdar's death, under three heads, viz., general treatment, ceremonies, and declarations. It was conceded that the talookdar paid all the expenses incident to the birth, maintenance, and ceremonies of his grandson; but it was contended that that fell far short of the treatment intended by the clause. The talookdar had taken his daughter away from her husband's home, and had established her as a permanent member of his own family, and by doing so necessarily took upon himself all the responsibilities for her child which would otherwise have devolved on its father. They did not prove treatment of him in all respects as his own son within the principles of interpretation of that claim as laid down in the judgment in *Pertab Narain Singh* v. *Subhao Kooer* (1). With regard to declarations by the talookdar it was urged that there was no written reference to the child as his successor, nor any distinct statement to that effect to any official person, and that the Respondent's case in this respect rested on various statements to private persons, and on entries in accounts. These, even if believed, did not in law constitute such a recognition by the talookdar of *Sajjad Husain* as to make him a statutory heir with a preferential title to the whole of his talookdar estate. The

(1) Law Rep. 4 Ind. Ap. 228.

Judicial Commissioner's judgment was open to the same objections as the one which it affirmed. The treatment which must be taken as proved by these concurrent findings did not shew treatment of the child which conforms to the authoritative interpretation of clause 4 by the Privy Council, or to any reasonable view of the intention of the Legislature. As regards property other than the talookdari estates, and not governed by Act I. of 1869, it was contended that by the general Mahomedan law applicable to Shiahs the Appellant was entitled to a daughter's share. It was submitted that in this appeal the Appellant was entitled to have her rights to such non-talookdari property ascertained and declared; otherwise, that she was entitled to have it declared that her claim thereto was not barred by these proceedings.

Cohen, Q.C., and *Branson*, for the Respondents, were not heard.

1894
June 30.

The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

The original Plaintiff in this suit was *Ahmadi Begam*, the only surviving widow of *Raza Husain*, talookdar of *Narauli*, who died in the year 1885, leaving no son. He had two daughters who survived him: the elder named *Sarfaraz*, and the younger named *Umrao*, who is the present Appellant. *Sarfaraz* married *Ahmed Husain*, who is one of the Respondents, and at the death of *Raza* she had a son named *Sajjad Husain*, then less than five years old. The original Defendants in the suit were *Sajjad*, *Sarfaraz*, and *Umrao*.

The talook, being entered in lists 2 and 3 under the *Oudh Estates Act*, is one of those which descend to a single heir by primogeniture, and which fall under the provisions of sect. 22 of that Act. On *Raza's* death a claim was preferred on behalf of the child *Sajjad*, that he was entitled to the talook under sub-sect. 4, inasmuch as he had been treated by *Raza* in all respects as his own son. On that claim *Sajjad* got possession, and soon afterwards *Ahmadi* instituted this suit, The title is governed entirely by the question whether *Sajjad* was treated

J. C.
1894
UMRAO BEGAM v. IRSHAD HUSAIN.

by *Raza* as a son. If he was, the talook passed to him and his male lineal descendants by virtue of sub-sect. 4. If not, it passed to *Ahmadi* for her life by virtue of sub-sect. 7.

Ahmadi, *Sarfaraz*, and *Sajjad* have all died since the institution of the suit. *Sajjad* has been replaced on the record by his brother *Irshad*. On the death of *Ahmadi* the appeal abated, and *Umrao* was allowed to revive it under circumstances on which their Lordships will presently make some remarks.

It is common ground that *Sajjad's* mother *Sarfaraz* was after her marriage taken into *Raza's* house, and that *Sajjad* was born there, and from that time till *Raza's* death he was treated as a child of the house. Evidence was given of a number of incidents, some apparently trivial and some important, for the purpose of shewing that *Raza's* treatment of *Sajjad* was that of a son. On *Ahmadi's* side it was contended that all those incidents were sufficiently accounted for by the circumstance that *Sarfaraz* and her son were inmates of *Raza's* house, and that *Sajjad* was his grandson, and in the line of succession. The case appears to have been very elaborately examined by the Courts below—first by the District Judge of *Lucknow*, and afterwards by the Judicial Commissioner of *Oudh*. Both Courts held that *Sajjad* had been treated as a son by *Raza*, and that *Ahmadi's* claim must be dismissed.

This is not only a question of fact, but it is one which embraces a great number of facts whose significance is best appreciated by those who are most familiar with Indian manners and customs. Their Lordships would be specially unwilling in such a case to depart from the general rule, which forbids a fresh examination of facts for the purpose of disturbing concurrent findings by the lower Courts. The counsel for the Appellant frankly admitted that they laboured under this difficulty, and that they must find some ground of law or general principle for impugning the decree.

To do this, they made some comments on the use made by the Courts below of *Raza's* oral statements; but those comments all resolved themselves into objections to the weight of evidence, and did not affect its admissibility. The only question of law or principle which they could suggest was founded on the

language used by this Committee in deciding the well-known case of *Man Singh's* estate (*Pertab Narain Singh* v. *Subhao Kooer* (1). It appears to have been pressed upon the committee that the treatment required by the *Oudh Estates Act* must be something of the nature of adoption. In answer to that suggestion, their Lordships pointed out that the section applies, not to Hindus alone, but to all religions, and they continue as follows:—

"It is necessary, then, to put a general as well as a rational construction upon the provision advisedly introduced by the Legislature into this statutory law of succession. And, taking the whole section together, their Lordships are of opinion that wherever it is shewn by sufficient evidence that a talukdar, not having male issue, has so exceptionally treated the son of a daughter as to give him in the family the place, consequence, and pre-eminence which would naturally belong to a son, if one existed, and would not ordinarily be conceded to a daughter's son, and has thus indicated an intention that the person so treated shall be his successor, such person will be brought within the enactment in question."

Upon this passage Mr. *Finlay* argued that the Committee intended to lay down an authoritative interpretation of the language of sub-sect. 4 of universal application; that treatment which does not conform to the description there given cannot rightly be held to fall within the sub-section; and that the Committee meant to indicate that the acts of treatment must be absolutely unequivocal and not by possibility referable to any other relationship than that of a son. But this argument puts a strained and unnatural construction on the words of the Committee. Their expression "general construction" clearly refers to the propriety of so construing the Act that it may apply to Mahomedans and others as well as Hindus. The rest of the passage is only a statement in abstract form of circumstances which will clearly bring a case within sub-sect. 4. In the sequel of the judgment they shew that those circumstances exist in the case before them. There is nothing to shew that the Committee intended to set up a standard to which all cases must conform,

(1) Law Rep. 4 Ind. Ap. 228.

J. C.
1894
UMRAO BEGAM v. IRSHAD HUSAIN.

or that they demanded more demonstrative proof for this kind of question than for any other.

Their Lordships hold that whenever the evidence shews that a daughter's son has been treated by the talookdar in all respects as his own, it is sufficient to bring the case within sub-sect. 4; that the question is one of fact, and must be tried and determined by the same methods as other questions of fact; and that it is very difficult, if not impossible, to lay down a test for such a question in terms less wide than those of the Act itself.

Their Lordships do not comment on the evidence in detail, because they think it important to maintain the general rule as to concurrent findings of fact. But as during the discussion their attention has been called to several points in the evidence, they think it right to add that nothing has been brought forward to induce them to think that the Courts below have taken any wrong view.

As regards the talook the appeal fails. But *Raza* was possessed of other property not belonging to his talook, both moveable and immoveable. *Ahmadi* claimed the whole; and *Umrao* now claims that, whatever the decision as to the talook, the rights of the parties to the non-talookdari property should be dealt with in this appeal. It appears that by her plaint *Ahmadi* claimed the whole property in block as devolving to her by force of sect. 22, sub-sect. 7, of the *Oudh Estates Act*, and by custom; that, being a Shiah and a childless widow, she was not entitled to any interest in the immoveables, and that in Court she did not press any claim to the moveables. What interests *Umrao* may have independently of *Ahmadi* is a question that has not been argued, because their Lordships are of opinion that the revived appeal is confined to the question raised between *Ahmadi* and *Sajjad* with regard to the talook.

On *Ahmadi's* death *Umrao*, being in the line of succession, applied to the Judicial Commissioner of *Oudh* to be allowed to revive and prosecute the appeal. That learned Judge felt difficulty in acceding to her application, but directed the proceedings to be forwarded to the Registrar of the Privy Council as a supplementary record. *Umrao* then applied to Her Majesty in Council for an order of revivor and substitution. Their Lord-

ships also felt difficulty, and in fact the case is peculiar and novel. But it appeared to them that the question of *Sajjad's status* must be settled, even if it should only affect the past income; that it would be simpler and less expensive to try it by the existing appeal than by a new suit; and that the *Oudh Estates Act* so far created a unity of interest between the persons in the line of succession as to justify the substitution, at least in such a case as this, of the more remote claimant for the nearer one. The application was not heard *ex parte*. Mr. *Branson* appeared for the Respondents, and agreed that the substitution of *Umrao* would be more beneficial to them. The order, therefore, was made at the wish of both parties. But nothing was said in the petition or at the Bar about non-talookdari property; the reasons for the revivor apply only to the talook; and it would obviously be improper and dangerous to allow *Umrao* to use the position she has obtained as the substitute of *Ahmadi* for the purpose of advancing her personal claims. Whatever claims *Umrao* has against any part of the estate she must enforce by suit on her own behalf. The present appeal wholly fails, and their Lordships will humbly advise Her Majesty to dismiss it with costs.

Solicitors for Appellant: *Young, Jackson, & Beard.*
Solicitor for the Respondents: *Solicitor, India Office.*

J. C.
1894
July 28.

CHUTRAPUT SINGH DOORGA . . . DEFENDANT;

AND

DWARKANATH GHOSE AND ANOTHER . PLAINTIFFS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Stay of Execution—Special leave to Appeal.

Their Lordships granted stay of execution of a decree of the High Court where an order to that effect had been refused, the Judges differing in opinion.

THIS was a petition by the Appellant for special leave to appeal from an order of *Norris*, J., dated April 27, 1894, refusing to stay execution of a decree against him pending appeal to Her Majesty; and for stay of execution.

The petition stated that the Respondents' testator sued as sebait of an idol in the Court at *Rajmahal* to recover possession of certain chur land and for mesne profits; that on the 30th of May, 1887, the Subordinate Judge decreed the suit in part with proportionate costs; that on the 4th of September, 1889, the High Court in appeal varied this decree by awarding to the Plaintiff a further portion of the land in suit; that on the 20th of April, 1892, the same Court in review awarded to the Plaintiff the whole of the land in suit; that pending an appeal to the Privy Council the Subordinate Judge ordered execution of the last-named decree and refused to stay the same; that on a further application to the High Court for stay of execution under sect. 608, clause (*c*) of the Code of Civil Procedure, *Norris*, J., and *Banerjee*, J., differed in opinion, with the result that the opinion of the Senior Judge, which was adverse to the application, prevailed.

Branson, for the Petitioner, stated that he made the application for special leave to appeal from the order as well as for stay of execution because it seemed to be the impression (as was

* *Present*:—LORD WATSON, LORD MACNAGHTEN, LORD MORRIS, and SIR RICHARD COUCH.

stated in *Wheeler's* Privy Council Law, p. 446) that the Judicial Committee would not stay execution when the Court which admitted the appeal had refused to stay it, but that they might when special leave had been granted by themselves. The grounds for the application were that the condition of the lands might deteriorate in the hands of the Respondents; that land-marks and boundaries might be made to disappear, thus giving rise to disputes with neighbouring proprietors; that it might be difficult to obtain a refund of mesne profits considering that the Respondents were only executors of the deceased decree-holder, who was himself only sebait of an idol.

Their Lordships were of opinion that as the two Judges in the High Court had differed in opinion, the discretion of the Court under sect. 608 had not in fact been exercised, and that the order for stay of execution should be made without granting special leave to appeal from the order complained of.

Solicitors for the Petitioner: *Barrow & Rogers.*

SIRDAR GURDYAL SINGH . . . . DEFENDANT;

AND

THE RAJAH OF FARIDKOTE . . . . PLAINTIFF.

TWO APPEALS CONSOLIDATED.

J. C.*
1894
June 29; *July* 3, 28.

ON APPEAL FROM THE CHIEF COURT OF THE PUNJAUB.

Jurisdiction of Foreign Court—Decrees of Foreign Court against absent Foreigners—Personal Actions.

No territorial legislation can give jurisdiction which any foreign Court ought to recognise against absent foreigners who owe no allegiance or obedience to the Power which so legislates.

In all personal actions the Courts of the country in which the Defendant resides, not the Courts of the country where the cause of action arose, should be resorted to.

Where a *Faridkote* Court passed *ex parte* money decrees against the

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* *Present:*—THE EARL OF SELBORNE, LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, LORD SHAND, and SIR RICHARD COUCH.

J. C.
1894
SIRDAR GURDYAL SINGH v. RAJAH OF FARIDKOTE.

Defendant, who had been treasurer of *Faridkote*, but at the date of suit had ceased to be such, and was resident in *Jhind*, of which State he was a domiciled subject:—

Held, that such decrees were a nullity by international law.

Becquet v. *Macarthy* (1) distinguished.

Schibsby v. *Westenholz* (2) explained.

CONSOLIDATED APPEALS from two decrees of the Chief Court of the *Punjaub* (July 24, 1888), reversing in second appeal the decrees of the Commissioner of *Lahore* (August 29, 1882), which affirmed decrees of the Assistant Commissioner (Feb. 24, 1882), and dismissed the Respondent's suits which were brought on the 12th of November, 1881.

The questions as to which the Courts below differed were matters of law, and related firstly, to the competence of the jurisdiction of the native Court of *Faridkote* under the special circumstances of these suits or at all to make binding *ex parte* decrees against the Defendant; and secondly, as to the competence of the British Indian Courts to recognise and give effect to those decrees.

The Respondent is Rajah and ruler of *Faridkote*, in the *Punjaub*, described by the Senior Judge of the Chief Court as a "protected dependent State," but "not incorporated with and not forming an integral part of the British Dominions," the chief of which has, under the engagements entered into with him by the British Government after the conquest of the *Punjaub*, the right of legislating for the internal affairs of his own State and constituting Courts of Justice, rights which that State had before possessed, and which were recognised and continued to it by those engagements, which are to be found in *Aitcheson's* Treaties, Engagements, and Sunnuds (ed. 1876, vol. vi. p. 59), and in the 2nd volume of the earlier edition, pp. 61, 437.

The Senior Judge, observing on those engagements, says as to the sunnud of the 21st of April, 1863:—

"The first article 'confirms and guarantees to the Rajah' all the powers and authority, civil, criminal and fiscal, at present exercised by the Rajah. There is no limitation expressed in the other articles, and certainly not in the 5th clause relied on by

(1) 2 B. & Ad. 951. (2) Law Rep. 6 Q. B. 161.

Defendant that the Rajah and his successors will exert themselves to execute justice and promote the happiness and welfare of their people."

"The first article appears to include legislative authority in civil matters, including the jurisdiction of State tribunals. Presumably such authority is vested either in the Rajah, as ruler of the State, or in the British Government, and it must necessarily have been frequently exercised in the past twenty years. No attempt has been made to shew that it has been exercised by the British Government, whereas there is evidence that it has been exercised by the Rajah."

Mr. *Aitcheson*, in his note on the sunnud of the 21st of April, 1863, observes :—

"This sunnud is in some respects similar to those granted in 1860 to the Maharaja of *Puttiala* and the Rajahs of *Jhind* and *Nabha*. But it differs from them in this most important respect, that it conferred no new rights or privileges on the Rajah, but merely guaranteed and confirmed to him those which he then enjoyed."

There was no difference of opinion in the Courts below as to the extent of the Rajah's powers, and the undisputed evidence shewed that in the exercise of those powers the Rajah had of his own authority adopted the Indian Codes of Civil Procedure, so far as they were applicable, *i.e.*, Act VIII. of 1859, and Act X. of 1877, of which the latter was in force in British *India* at and before the institution of these suits, and had appointed judges of varying jurisdictions to try causes, of whom prior to the commencement of the litigation between these parties in the *Faridkote* Courts one *Gunga Pershad* was the Chief Judge, having jurisdiction to try suits of any value, and one *Ganhar Singh* had, until the special authority given to him to try the present suits against the Respondent, a jurisdiction limited to suits of the value of Rs.1000.

Bir Singh, the father of the Appellant, was a native of *Jhind*, another of the protected dependent States of the *Punjaub*, and a servant of the Respondent's father. According to the Commissioner of *Lahore* he "not only contracted with the Rajah to keep

J. C.
1894
SIRDAR GURDYAL SINGH v. RAJAH OF FARIDKOTE.

his accounts or otherwise to act for him as bakshi or treasurer, but resided in the State for two or three years more in the capacity of bakshi." Two subordinate officers were employed under him in the Treasury. Considerable defalcations in the moneys under his charge were alleged. *Bir Singh* left his employment, and after some correspondence in 1877 plaints in two suits were filed in the *Faridkote* Civil Court presided over by *Ganhar Singh*, acting in pursuance of the Rajah's authority. The first was brought against *Bir Singh* and his two subordinates, claiming Rs.61,664 in respect of the alleged defalcations in the Treasury; the second against *Bir Singh* alone, to recover Rs.18,324 as due for principal and interest in respect of certain moneys received by him from the State on his own account, and also for Rs.10,000, the price of some property at *Lahore*. Summonses were served on *Bir Singh*.

Ganhar Singh, on the 8th of November, 1879, gave judgment in the first suit against the three Defendants jointly for Rs.60,341; and on the 25th of January, 1880, a decree in the second suit against *Bir Singh* alone for Rs.16,133. The latter had no assets in *Faridkote*, and execution of the decrees in *Jhind* was considered difficult to obtain. But having engaged in trading transactions in *Lahore*, he came under the jurisdiction of the *Lahore* Court, and thereupon the suits in which these appeals arose were instituted.

The material issues settled were—

I. Has the Court jurisdiction,

(*b.*) By reason of the Plaintiff being a recognised foreign State or the object of the suit being to enforce the private rights of the Plaintiff within the meaning of sect. 431 Civil Procedure Code. (Onus on Plaintiff).

II. Had the *Faridkote* Court which tried the suit jurisdiction,

(*a.*) Over the person of the Defendant?

(*b.*) The subject-matter of the suit?

(*c.*) By reason of the Judge's pecuniary powers, and can this objection (*c*) be pleaded in the present suit? (Onus on Defendant).

The Assistant Commissioner held that *Faridkote* was ad-

mittedly "a recognised foreign State," and that its established and recognised Courts were foreign Courts; and that the *Lahore* Court had jurisdiction in a suit instituted by the Rajah of *Faridkote* to recover moneys made away or misapplied by his servant, whether the Plaintiff sued personally or as a ruler of a State.

He further held, that as *Bir Singh* was a subject of the State of *Jhind*, and was never domiciled in *Faridkote*, and had left that State without any intention of returning some time before the suits were instituted against him in the *Faridkote* Court, "it was clear the latter Court would have had no jurisdiction over his person," unless he had submitted himself to the jurisdiction, and the Assistant Commissioner expressed his opinion that there was no authority for such a proposition, and referred to several cases, and in particular to the judgment of *Blackburn*, J., in the case of *Schibsby* v. *Westenholz* (1), where that learned Judge threw out, without deciding the point, that a defendant would be bound by the laws of the country in which he contracted. And the Assistant Commissioner, after expressing an opinion that these present suits were based not on contract, but tort, went on to say that even if such a doctrine could be maintained in a more highly civilised State, it would not be applicable in a protected native State with no known settled laws and judicial system.

And he concluded his judgment on that point in these words:—

"Thus it seems clear that, judged by the general law governing the subject of foreign judgments, and treating *Faridkote* as a foreign country like *France* and *Germany*, the present judgments must fail on the ground of want of jurisdiction on the part of the *Faridkote* Court over the person of the Defendant, and no submission to jurisdiction is made out."

The Commissioner affirmed this judgment on a ground not referred to by the First Court. He held that it was open to question whether the English common law had any application in *India*, and that it had been decided in *Bhavanishankar Shevakram*

(1) Law Rep. 6 Q. B. 155.

J. C.
1894
SIRDAR GURDYAL SINGH v. RAJAH OF FARIDKOTE.

v. *Pursadri Kalidas* (1) that the Courts of British *India* had no jurisdiction to entertain a suit on a judgment of a native Indian Court, the judgment in question in that case being one of a Court of His Highness the Guikwar of *Baroda*; that the judgments of any native State do not give rise to any obligation in a British Court, except as provided by sect. 134 of the Code of Civil Procedure.

The Chief Court (*Bir Singh* having died) reversed these decrees, and gave the Respondent decrees for the amounts claimed by him in each case with costs in all Courts.

The Judges held—

(*a.*) On the question as to the status of *Faridkote* that it had all such attributes of independent States as were compatible with its condition of protection and dependence, and which might be consistent with any compact subsisting between it and the protecting power, and with the established course of dealing between them, and that it should in the Courts of Law be treated on the footing of an independent State.

(*b.*) That the right of jurisdiction was a right incidental to such independence, and that the ruler of such a State had the power to prescribe rules of civil jurisdiction, including rules empowering the Courts of the State to hear and decide causes against non-resident aliens when the obligation sought to be enforced was contracted by such aliens while resident in the State.

(*c.*) That the question whether the *Faridkote* Court was a Court of competent jurisdiction depended in part upon the question whether, according to the maxims of the Courts of British *India*, a rule made granting jurisdiction over a non-resident alien in respect of a cause of action arising within the territory ought to be recognised as a valid rule.

(*d.*) That such a rule had been in fact prescribed by the *Faridkote* State which had been shewn to have adopted the Indian Civil Procedure Code, which in sect. 4 of Act VIII. of 1859 had expressly declared that no person was to be exempted from the jurisdiction of any Civil Court by reason of his place of birth, or by reason of descent; and in sect. 5 gave jurisdiction to the Courts within the limit of whose jurisdiction the cause of

(1) Ind. L. R. 6 Bomb. 292.

controversy had arisen, provisions which are also to be found in Act X. of 1877.

(*e.*) That the *Faridkote* Court was a foreign Court within the meaning of sect. 2 of Act X. of 1877.

(*f.*) That *Faridkote* was a foreign State within the meaning of sect. 431 of Act X. of 1877, and that the said suits in the *Lahore* Court were suits to enforce the private rights of the head of the *Faridkote* State, and as such were maintainable under Clause B of the said section.

(*g.*) That a judgment of a Court of a native State in *India* might constitute a cause of action in a British Indian Court.

(*h.*) That to a suit brought upon such a judgment, want of jurisdiction in the Court that pronounced the judgment sued upon might be pleaded, that it had not been proved in this case that the *Faridkote* Court was not a Court of competent jurisdiction, but that in their opinion, according to the laws of the *Faridkote* State, the *Faridkote* Court had jurisdiction over the said *Bir Singh* and over the subject-matter of the said suits, and further that the authority of the said *Ganhar Singh* had not come to an end when the said judgments were pronounced.

(*i.*) That according to the laws of British *India*, the *Faridkote* Court was a Court competent to try the said case and to pronounce judgment therein, though the said *Bir Singh* was not a subject of or resident in the said State when the suits were instituted against him, because the obligations in respect of which the said judgments were pronounced were contracted by the said *Bir Singh* during his residence in the said State, and were intended to be there fulfilled.

(*j.*) That though it would be a good defence to such a suit, that the Defendant had no opportunity of defending himself in the foreign Court, and no notice to give him such opportunity, yet that in this case the said *Bir Singh* had such notice but did not avail himself of it; and in a later part of their judgment the learned Judges held that the question of whether the said *Bir Singh* had received notice in time to enable him to defend the said suits was a question of fact which had been decided against him in the lower Courts, and which he could not therefore raise on second appeal.

J. C.
1894
SIRDAR GURDYAL SINGH v. RAJAH OF FARIDKOTE.

(*k.*) That it could not be pleaded to an action on such a judgment that the judgment was erroneous upon the merits of the questions it decided.

The learned Judges then reserved for further consideration the question whether the said judgments had been obtained by fraud, and came to the conclusion that they had not been so obtained.

The material passages in the judgment of the Chief Judge in reference to the point decided by their Lordships is as follows:—

"The broad question is whether the First Court rightly decided on the facts found that the *Faridkote* Court was not a Court of competent jurisdiction to pronounce the judgment sued upon?

"The material facts are as follows:—

"The Defendant was not a subject of the *Faridkote* State: he resided there for some years as an officer in the service of the State, but had quitted the State some years before the commencement of the suit in the *Faridkote* Court, and had not returned, and did not intend to return, to the State.

"His service in the State involved the receipt and custody of moneys of the State, to be accounted for by him to the State, and the original action brought against him was brought to recover moneys alleged not to have been duly accounted for, and to have been misappropriated by him in the State during his service. The judgment found that he was indebted to the Plaintiff for a specified amount, and upon that judgment this suit is brought.

"Assuming for the present that the Judge had proper authority according to the laws of the State to hear and decide the suit, and that the Defendant had due notice of the proceedings, I think it must be held that the *Faridkote* Court was a Court of competent jurisdiction.

"It appears to be an open question under the English law, whether, under the circumstances stated, a foreign Court would have jurisdiction. In *Schibsby* v. *Westenholz* (1) *Blackburn*, J., said: 'If at the time when the obligation was contracted the Defendants were within the foreign country, but left it before

(1) Law Rep. 6 Q. B. 161.

the suit was instituted, we should be inclined to think the laws of that country bound them, though before finally deciding this we should like to hear the question argued.'

"There is certainly, so far as I can ascertain, no rule of international jurisprudence universally recognised that a municipal Court is absolutely incompetent to exercise jurisdiction over a non-resident foreigner, and it is certain that in many, if not in most countries, the municipal law authorises the exercise of jurisprudence in such cases by its own Courts, subject, generally speaking, to the condition that notice, actual or constructive, be given to the absent defendant. For instance, by a recent change in the English law, as contained in rule 1 and 1A of Order XI., under the English *Judicature Acts*, a summons may be issued for service without the jurisdiction in the cases specified. Again, the Code of Civil Procedure expressly enacts in sect. 10, that no person shall, by reason of his descent or place of birth, be in any civil proceedings exempt from the jurisdiction of any of the Courts, and in sect. 89 provides for service of summons outside the jurisdiction, while sect. 17 authorises the Court to take cognizance of certain suits when the cause of action has arisen within the jurisdiction.

"Again, it is certain that, according to the English doctrine, a non-resident foreigner may in a variety of ways submit himself to the jurisdiction of the Courts of a country, by the laws of which he is not otherwise bound, so as to be bound by the judgment of such Court, when sought to be enforced against him in his own country.

"Further, it is certain that whenever a question arises of enforcing the obligations arising out of a contract, the law to be applied is the *lex loci contractûs*, and this furnishes a strong argument in favour of the binding effect of the judgment of a tribunal *loci contractûs* over an absent foreigner who had contracted while resident in the country where such tribunal is situate.

"On the other side are the rules laid down by *Savigny* as to the *forum contractûs*, or *rei gestæ* (or the *forum speciale obligationis*), resort to which is subject to the condition that the defendant is either personally present there, or possesses property there.

J. C.
1894
SIRDAR GURDYAL SINGH v. RAJAH OF FARIDKOTE.

But on this Mr. *Westlake* remarks that 'this qualification appears to be a condition narrowing the principle on which the rules are founded.'

"A distinction is suggested in the judgment of the district Court as to the action being in contract or in tort. I do not think this is material. The case in the *Faridkote* Court was one of enforcing an obligation arising out of a contract made and to be fulfilled in the *Faridkote* State, namely, to account truly for moneys received; and it seems immaterial whether the breach by way of non-fulfilment amounted to a wrong or not. But the case of wrongs affords an argument in favour of the jurisdiction claimed; for, by universal practice, jurisdiction of a State is admitted over all wrongs committed within the territory, whether by subjects or foreigners. (*Westlake*, 108, 118, and 119).

"On the whole, I think it may be said that a State assuming to exercise jurisdiction over an absent foreigner in respect of an obligation, arising out of a contract made by the foreigner while resident in the State, and to be fulfilled there, is not acting in contravention of the general practice or the principles of international law, so that its judgment should not be binding merely on the ground of the absence of the defendant."

Jelf, Q.C., and *Branson*, for the Appellant, contended that the foreign judgments sued on were not, under the special circumstances of the case, judgments on which the *Lahore* Court was justified in passing decrees. These circumstances included the fact that the only summonses proved to have been served by the *Faridkote* Court were served after the date fixed in the summons for the hearing of the cases had passed. The *Faridkote* Court was one from which an appeal lay to the Rajah himself, who was Plaintiff in the suits. The Judge, moreover, was a nominee of the Plaintiff; and it was contended that his power to act as Judge had expired; and that the cases were decided in the absence of any sufficient evidence being adduced. Under these circumstances, even assuming the jurisdiction of the *Faridkote* Court, these are judgments into which a British Court will inquire, and which it will not treat as binding: see *The*

Charkieh (1). But the *Faridkote* Court had no jurisdiction on any recognised principle of international law against the Appellant, who had left the territory, and was no longer either actually or constructively a resident therein, but was a domiciled subject of the State of *Jhind*: see *Godard* v. *Gray* (2); *Schibsby* v. *Westenholz* (3); a judgment of *Holloway*, J., in *Mathappa Chetti* v. *Chellappa Chetti* (4); and *Westlake's* Private International Law (ed. 1890), p. 206; *Foote's* Private International Jurisprudence (2nd ed.), p. 560. Reference was also made to the *Duchess of Kingston's Case* (5); *Price* v. *Dewhurst* (6).

It lies on the Respondent to establish that the Court which gave him his decree had jurisdiction—that is, was legally entitled to exercise coercive power over the Defendant, and that it did exercise it in such a way as that a foreign Court may without violating natural justice give effect to it and to the decrees which it passed: see *Bank of Australasia* v. *Nias* (7); *Ferguson* v. *Mahon* (8); *Rousillon* v. *Rousillon* (9); *Ashbury* v. *Ellis* (10). If the Court had no jurisdiction, the decrees were an absolute nullity; if it had jurisdiction, and passed them against a man who had no notice of the proceedings till after they had terminated in decrees, they must be treated as nullities by all foreign Courts.

Finlay, Q.C., *Doyne*, and *Rattigan*, for the Respondent, contended that the point as to the claim being contrary to natural justice was new, and that any question of fraud in obtaining the *Faridkote* judgments had been given up in the Courts below. With regard to service of notice or summons, it was rightly held that the Appellant had had full notice of the suits, and had advisedly declined to appear. He, at all events, had an opportunity of appearing, and might have chosen to avail himself of it: see *Vadala* v. *Lawes* (11), following *Abouloff* v. *Oppenheimer & Co.* (12). With regard to the jurisdiction of the *Faridkote* Court,

(1) Law Rep. 4 A. & E. 59.
(2) Law Rep. 6 Q. B. 139.
(3) Law Rep. 6 Q. B. 155.
(4) Ind. L. R. 1 Madras, 199.
(5) 2 Sm. L. C. 871.
(6) 8 Sim. 279.
(7) 16 Q. B. 717.
(8) 11 Ad. & E. 179.
(9) 14 Ch. D. 351, 371.
(10) [1893] A. C. 341.
(11) 25 Q. B. D. 310.
(12) 10 Q. B. D. 295.

J. C.
1894
SIRDAR GURDYAL SINGH v. RAJAH OF FARIDKOTE.

it was contended that it clearly had jurisdiction over the Appellant as to the matters in suit while he remained in the territory of *Faridkote*, and that it retained that jurisdiction after he had withdrawn himself from that territory. It is not merely that the cause of action arose in *Faridkote*, but the larger suit is entirely occupied with this, that he did not account, having been treasurer. By becoming State treasurer the Appellant submitted himself to the jurisdiction of the *Faridkote* Court, for where a man takes office in a State he must be deemed to have agreed to be bound by the jurisdiction of that State as accounting for money due from him to that State in respect of that office. In any case, where an office is accepted in that way, and the whole cause of action arises in that State, there is jurisdiction which is obligatory on the acceptor. The law of procedure in *Faridkote* was that embodied in Act VIII. of 1859, which had been adopted in *Faridkote*: see sect. 5. Reference was made to *Phillimore's* International Law (ed. 1889), vol. iv. p. 758. In British *India* the Court whose judgment should be enforced is the Court in the ambit of whose jurisdiction the cause of action arose. The sections in the Code are intended to regulate the distribution of business amongst the Courts. The English legal rule is that wherever there is a contract to be performed within the jurisdiction of any Court, there may be service of summons outside the jurisdiction: see the first order under the *Judicature Acts*. The Roman Law, however, is to be referred to as the source of the rules applicable to this case. The maxim is, "*Actor sequitur forum rei.*" That brings in, no doubt, the domicil of the *reus*; but, subject to this, that where the obligation is to be performed, there is the place of jurisdiction: see Digest, bk. v. tit. 1, s. 19, "Si quis tutelam vel curam vel negotia vel argentariam vel quid aliud, unde obligatio oritur, certo loci administravit; etsi ibi domicilium non habuit, ibi se debebit defendore et si non defendat neque ibi domicilium habeat, bona possideri patietur." Seizing goods was the means of compelling appearance; but the jurisdiction arose when a contract was made and broken by the Defendant within its local ambit. See also *Mathappa Chetti* v. *Chellappa Chetti* (1), where the

(1) Ind. L. R. 1 Madras, 199.

above passage of the Digest is cited. There the contract was made, was to be performed, and was broken in the jurisdiction. [LORD WATSON:—That applied to a man who was personally subject to the jurisdiction.] See Digest, bk. 42, tit. 5, s. 2, and a passage from *Savigny*, quoted by *Westlake* in his International Law, pp. 205, 208. Reference was made to *Hewitson* v. *Fabre* (1); *Becquet* v. *Macarthy* (2); to *Don* v. *Lippman* (3), to an observation (p. 21) of Lord *Brougham*, in reference to an action brought in the *Mauritius* after the defendant had gone to the *Cape of Good Hope*. [EARL OF SELBORNE:—There the defendant was actually holding office at the time in the *Mauritius*; here the Defendant had ceased to be treasurer of *Faridkote*.] *Williams* v. *Jones* (4), cited by *Blackburn*, J., in *Schibsby* v. *Westenholz* (5); *Godard* v. *Gray* (6). Here the Defendant had held office, was connected by circumstances with the State, and had assets therein, pay being still due to him: *Rousillon* v. *Rousillon* (7); *Kaliyugam Chetti* v. *Chokalinga Pillai* (8); *Sama Rayar* v. *Annamalai Chetti* (9).

Counsel for the Appellant were not heard in reply.

1894
July 28.

The judgment of their Lordships was delivered by the

EARL OF SELBORNE:—

The Respondent, the Rajah of *Faridkote*, obtained in the Civil Court of that native State, in 1879 and 1880, two *ex parte* judgments, in two suits instituted by him against the Appellant, for sums amounting together to Rs.76,474 11*a*. 3*p*., and costs. For all the purposes of the question to be now decided, those two suits may be treated as one; the appeals to Her Majesty in Council having been consolidated. Two actions, founded on these judgments, were brought by the Rajah against the Appellant in the Court of the Assistant Commissioner of *Lahore* and were dismissed by that Court, on the ground that the judgments were pronounced by the *Faridkote* Court, without jurisdiction as

(1) 21 Q. B. D. 6.
(2) 2 B. & Ad. 951.
(3) 5 Cl. & F. 1.
(4) 9 M. & W. 819.
(5) Law Rep. 6 Q. B. 155.
(6) Law Rep. 6 Q. B. 137.
(7) 14 Ch. D. 351.
(8) Ind. L. R. 7 Madras, 105.
(9) Ind. L. R. 7 Madras, 164.

J. C.
1894
SIRDAR GURDYAL SINGH v. RAJAH OF FARIDKOTE.

against the Appellant. On appeal to the Additional Commissioner of *Lahore*, the judgments of the first Court were upheld. The Rajah then appealed to the Chief Court of the *Punjaub*, which differed from both those tribunals, and upheld the jurisdiction of the *Faridkote* Court.

Faridkote is a native State, the Rajah of which has been recognised by Her Majesty as having an independent civil, criminal, and fiscal jurisdiction. The judgments of its Courts are, and ought to be, regarded in Her Majesty's Courts of British *India* as foreign judgments. The Additional Commissioner of *Lahore* thought that no action could be brought in Her Majesty's Courts upon a judgment of a native State; but in this opinion their Lordships do not concur.

The Appellant was for five years, beginning in 1869, in the service of the late Rajah of *Faridkote* as his treasurer; and the causes of action, on which the suits in the *Faridkote* Court were brought, arose within that State, and out of that employment of the Appellant by the late Rajah. The claim made in each of the suits was merely personal, for money alleged to be due, or recoverable in the nature of damages, from the Appellant. It is immaterial, in their Lordships' view, to the question of jurisdiction (which is the only question to be now decided) whether the case, as stated, ought to be regarded as one of contract or of tort.

The Appellant left the late Rajah's service, and ceased to reside within his territorial jurisdiction, in 1874. He was from that time generally resident in another independent native State, that of *Jhind*, of which he was a native subject and in which he was domiciled; and he never returned to *Faridkote* after he left it in 1874. He was in *Jhind* when he was served with certain processes of the *Faridkote* Court, as to which it is unnecessary for their Lordships to determine what the effect would have been if there had been jurisdiction. He disregarded them, and never appeared in either of the suits instituted by the Rajah, or otherwise submitted himself to that jurisdiction. He was under no obligation to do so, by reason of the notice of the suits which he thus received or otherwise, unless that Court had lawful jurisdiction over him.

Under these circumstances there was, in their Lordships' opinion, nothing to take this case out of the general rule, that the Plaintiff must sue in the Court to which the Defendant is subject at the time of suit ("*Actor sequitur forum rei*"); which is rightly stated by Sir *Robert Phillimore* (International Law, vol. 4, s. 891) to "lie at the root of all international, and of most domestic, jurisprudence on this matter." All jurisdiction is properly territorial, and "*extra territorium jus dicenti, impune non paretur.*" Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory while they are within it; but it does not follow them after they have withdrawn from it, and when they are living in another independent country. It exists always as to land within the territory, and it may be exercised over moveables within the territory; and, in questions of *status* or succession governed by domicil, it may exist as to persons domiciled, or who when living were domiciled, within the territory. As between different provinces under one sovereignty (*e.g.*, under the Roman Empire) the legislation of the sovereign may distribute and regulate jurisdiction; but no territorial legislation can give jurisdiction which any foreign Court ought to recognise against foreigners, who owe no allegiance or obedience to the Power which so legislates.

In a personal action, to which none of these causes of jurisdiction apply, a decree pronounced *in absentem* by a foreign Court, to the jurisdiction of which the Defendant has not in any way submitted himself, is by international law an absolute nullity. He is under no obligation of any kind to obey it; and it must be regarded as a mere nullity by the Courts of every nation except (when authorized by special local legislation) in the country of the *forum* by which it was pronounced.

These are doctrines laid down by all the leading authorities on international law; among others, by *Story* (Conflict of Laws, 2nd ed., ss. 546, 549, 553, 554, 556, 586), and by Chancellor *Kent* (Commentaries, vol. 1, p. 284, note *c*, 10th ed.), and no exception is made to them, in favour of the exercise of jurisdiction against a defendant not otherwise subject to it, by the

J. C.
1894
SIRDAR GURDYAL SINGH v. RAJAH OF FARIDKOTE.

Courts of the country in which the cause of action arose, or (in cases of contract) by the Courts of the *locus solutionis*. In those cases, as well as all others, when the action is personal, the Courts of the country in which a defendant resides have power, and they ought to be resorted to, to do justice.

The conclusion of the learned Judges in the Chief Court of the *Punjaub* is expressed in the following sentence of the judgment delivered by Sir *Meredyth Plowden* in the first of the two actions:—

"On the whole, I think it may be said, that a State assuming to exercise jurisdiction over an absent foreigner, in respect of an obligation arising out of a contract made by the foreigner while resident in the State and to be fulfilled there, is not acting in contravention of the general practice or the principles of international law, so that its judgment should not be binding merely on the ground of the absence of the defendant."

If this doctrine were accepted, its operation, in the enlargement of territorial jurisdiction, would be very important. No authority, of any relevancy, was cited at their Lordships' Bar to support it, except *Becquet* v. *Macarthy* (1), and a passage from the judgment delivered by *Blackburn*, J., in *Schibsby* v. *Westenholz* (2).

Of *Becquet* v. *Macarthy* (1), it was said by great authority in *Don* v. *Lippman* (3), that it "had been supposed to go to the verge of the law"; and it was explained (as their Lordships think, correctly) on the ground that "the defendant held a public office in the very colony in which he was originally sued." He still held that office at the time when he was sued; the cause of action arose out of, or was connected with it; and, though he was in fact temporarily absent, he might, as the holder of such an office, be regarded as constructively present in the place where his duties required his presence, and therefore amenable to the colonial jurisdiction. If the case could not be distinguished on that ground from that of any absent foreigner who, at some previous time, might have been in the employment of a colonial government, it would, in their Lordships' opinion, have

(1) 2 B. & Ad. 951. (2) Law Rep. 6 Q. B. 155.
(3) 5 Cl. & F. 1.

been wrongly decided; and it is evident that *Fry*, L.J., in *Rousillon* v. *Rousillon* (1), took that view.

The words of *Blackburn*, J.'s, judgment, in *Schibsby* v. *Westenholz* (2), which were relied upon, are these:—

"If, at the time when the obligation was contracted, the defendants were within the foreign country, but left it before the suit was instituted, we should be inclined to think the laws of that country bound them; though, before finally deciding this, we should like to hear the question argued."

Upon this sentence it is to be observed, that beyond doubt in such a case the laws of the country in which an obligation was contracted might bind the parties, so far as the interpretation and effect of the obligation was concerned, in whatever *forum* the remedy might be sought. The learned Judge had not to consider whether it was a legitimate consequence from this, that they would be bound to submit, on the footing of contract or otherwise, to any assumption of jurisdiction over them in respect of such a contract, by the tribunals of the country in which the contract was made, at any subsequent time, although they might be foreigners resident abroad. That question was not argued, and did not arise, in the case then before the Court; and, if this was what *Blackburn*, J., meant, their Lordships could not regard any mere inclination of opinion, on a question of such large and general importance, on which the judges themselves would have desired to hear argument if it had required decision, as entitled to the same weight which might be due to a considered judgment of the same authority. Upon the question itself, which was determined in *Schibsby* v. *Westenholz* (2), *Blackburn*, J., had at the trial formed a different opinion from that at which he ultimately arrived; and their Lordships do not doubt that, if he had heard argument upon the question, whether an obligation to accept the *forum loci contractûs*, as having, by reason of the contract, a conventional jurisdiction against the parties in a suit founded upon that contract for all future time, wherever they might be domiciled or resident, was generally to be implied, he would have come (as their Lordships do) to the

(1) 14 Ch. D. 351. (2) Law Rep. 6 Q. B. 161.

J. C.
1894
SIRDAR GURDYAL SINGH v. RAJAH OF FARIDKOTE.

conclusion, that such obligation, unless expressed, could not be implied.

Their Lordships will therefore humbly advise Her Majesty to reverse the decrees of the Chief Court of the *Punjaub*, and to restore those of the Additional Commissioner of *Lahore*. The Respondent will pay the costs of the appeals to the Courts below and of these appeals.

Solicitors for the Appellant: *Payne & Lattey.*
Solicitors for the Respondent: *T. L. Wilson & Co.*

END OF VOL. XXI.

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INDEX.

ACCOUNT: *See* LAW OF PRE-EMPTION.

ACKNOWLEDGMENT OF LEGITIMACY: *See* MAHOMEDAN LAW.

ACT XIV. OF 1882, s. 244: *See* CONSTRUCTION OF DECREE.

ACT XIV. OF 1882, s. 260.] Where Plaintiffs' application under sect. 260 of the Code of Civil Procedure for execution of a decree was dismissed on the ground that they had not afforded the Defendant an opportunity of obeying it:—*Held*, that a second application, after such opportunity has been afforded, is not barred as *res judicata*. KISHORE BUN MOHUNT *v.* DWARKANATH ADHIKARI - - - - - - 89

APPLICATION FOR EXECUTION OF DECREE: *See* ACT XIV. OF 1882, s. 260.

APPOINTMENT: *See* CONSTRUCTION OF DECREE.

APPORTIONMENT OF RENT: *See* LESSOR AND LESSEE.

AWARD—*Failure to dispose of all Matters referred—Consent of Parties.*] The ground upon which an award which does not dispose of all the matters referred is held to be invalid, is, that there is an implied condition that it shall do so. —Where an award divided parts of property referred for division, the parties thereto agreeing to the division being made by steps, and that each division should be final and not dependent on a complete partition being ultimately effected: —*Held*, that such consent validated the award, though otherwise it might have been *ultrà vires* of the arbitrators. MAKUND RAM SUKAL *v.* SALIQ RAM SUKAL - - - - - 3

BENGAL TENANCY ACT, 1885, s. 67: *See* RES JUDICATA.

BOUNDARY LINE OF WASTE LANDS: *See* PROCEDURE.

"CARRY ON BUSINESS": *See* JURISDICTION.

CASES—*Ashrufood Dowlah Ahmed Hossein Khan* v. *Hyder Hossein Khan* (11 Moo. Ind. Ap. 113) followed - - - 56
See MAHOMEDAN LAW.

—— *Becquet* v. *Macarthy* (2 B. & Ad. 951) distinguished - - - - 171
See JURISDICTION OF FOREIGN COURT.

—— *Pertab Narain Singh* v. *Subhao Kooer* (Law Rep. 4 Ind. Ap. 228) considered - 163
See OUDH ESTATES ACT.

—— *Schibsby* v. *Westenholz* (Law Rep. 6 C. B. 161) explained - - - 171
See JURISDICTION OF FOREIGN COURT.

CIVIL PROCEDURE CODE, s. 584: *See* PROCEDURE.

CLAIMS BY ADVERSE TITLE AND BY PRE-EMPTION INCONSISTENT: *See* LAW OF PRE-EMPTION.

COMPOUND INTEREST: *See* VENDOR AND PURCHASER.

CONSENT OF PARTIES: *See* AWARD.

CONSTRUCTION—*Evidence—Sale or Mortgage—Vendor and Purchaser.*] Where an entry "ownership transferred to *J. N.*" had been made in the Register of Sales of Waste Lands against lots granted to the Appellant, and had been indorsed on the grants relating thereto:—*Held*, reversing the decision of two Appellate Courts, that although the inference in favour of sale and undisclosed consideration might have been right if the indorsements had stood alone, yet that on the whole evidence the transaction was not one of sale, but of transfer by way of security.—The entry was in pursuance of a joint petition by the Appellant and *J. N.* which on its true construction was inconsistent with an absolute sale; the undisclosed consideration could only have been the cancelment of Appellant's indebtedness to *J. N.*: the latter retained uncancelled the documents relating thereto, including a mortgage which was subsequently enforced: the surrounding probabilities were in favour of the Appellant's retention of a right to redeem. KADER MOIDEEN *v.* C. W. NEPEAN - - - - - 96

2. —— *Holder of Shares—Terms of Allotment—Extra Dividend.*] Where shares in a company had been allotted on terms that the allottee or his executors should receive an extra dividend thereon so long as they should hold them:—*Held*, that the extra dividend continued to be payable after the death of the allottee, the shares still standing in his name. The company had no equity to have the estate distributed or the shares appropriated to the parties beneficially entitled, so as to get rid of the condition on which the extra dividend was payable. BOMBAY BURMAH TRADING CORPORATION *v.* SMITH - 71

CONSTRUCTION OF DECREE—*Succession to the Headship of a Math—Nomination—Appointment—Act XIV. of 1882, s. 244.*] Where a Plaintiff had been declared by decree of the High Court entitled as the head of his Adhinam "to see that a competent Tambiran was appointed as the head of a specified mutt" and the Court below had been directed to appoint on the Plaintiff's nomination if it saw no objection as to fitness otherwise to appoint on its own selection; and the Plaintiff in an execution proceeding nominated the Appellant:—*Held*, that the Respondent who had succeeded to the Plaintiff's headship and decree was

CONSTRUCTION OF DECREE—*continued.*

not entitled to withdraw his nomination; but that the Appellant was entitled to a decision of the Court as to his fitness, and that the High Court was wrong upon the evidence in overruling the Lower Court's sanction of the nomination.—*Held*, further, that the question raised arose between the parties to the suit, and related to the execution of the decree within the meaning of Act XIV. of 1882, s. 244. PONNAMBALA TAMBIRAN *v.* SIVAGNANA DESIKA GNANA SAMBHANDA PANNARA SANNADHI - - - 71

CONSTRUCTION OF DEEDS: *See* PRACTICE.

CO-SHARER NOT LIABLE TO SHARE COSTS OF SUCCESSFUL LITIGATION UNAUTHORIZED BY HIM: *See* LAW OF PRE-EMPTION.

DECREE FOR POSSESSION OF PORTION OF LEASED LANDS: *See* LESSOR AND LESSEE.

DECREES OF FOREIGN COURT AGAINST ABSENT FOREIGNERS: *See* JURISDICTION OF FOREIGN COURT.

EFFECT OF COMPROMISE: *See* RIGHTS OF MANAGEMENT OF A TEMPLE.

EVIDENCE—*Hoondi Transactions.*] Case in which it was held, upon evidence as to which there had been conflicting findings by the Courts below, that the Plaintiffs had proved the genuineness of the hoondi transactions in respect of which they sued. TEWARI JASWANT SINGH *v.* LALA SHEO NARAIN LAL - - - - - 6

2. —— *Membership of sect of Nihangs—Succession.*] Where the Plaintiffs claimed to succeed to the property in suit according to the rules of succession in favour of disciples which prevail amongst the sects of Nihangs:—*Held*, after examination of evidence, upon which the Courts below had arrived at conflicting findings, that the Plaintiffs had failed to prove that the deceased proprietor had belonged to that sect. MAHANT GAJRAJ PURI *v.* ACHAIBAR PURI - - 17

—— *See* CONSTRUCTION.

EXTRA DIVIDEND: *See* CONSTRUCTION.

FAILURE TO DISPOSE OF ALL MATTERS REFERRED: *See* AWARD.

FRAUD: *See* SUNNUD OF SHIVAGUNGA.

GIFT BY HINDU WIDOW—*Onus Probandi—Pension Act*, 1871—*Suit to recover Malikana.*] To establish a gift from a Hindu widow, the *onus* is on the donee to shew that the widow, knowing her rights, and knowing that she was making a free gift, did so make it. Where in a suit by a Hindu widow to obtain possession of a moiety of her husband's estate, it was contended that under a family arrangement, resulting from a long series of transactions between the Plaintiff, the mother of the Plaintiff's husband, and the Defendant, the widow of that husband's predeceased son, the Defendant was legally entitled to such moiety:—*Held*, overruling the High Court, that such transactions, which included mutation of

GIFT BY HINDU WIDOW—*continued.*

names, an alleged award, a partition, several years' possession by the Defendant, and exercise of proprietary rights by her, failed to prove any intention on the part of the Plaintiff to transfer title to the Defendant.—So far as the suit related to a share of malikana granted by the Government in lieu of relinquished proprietary right, *held* that under the *Pensions Act*, 1871, it was not cognisable by the Court, no certificate having been obtained by the Plaintiff under the Act. DEO KUAR *v.* MAN KUAR - - - 148

HOONDI TRANSACTIONS: *See* EVIDENCE. 1.

HINDU LAW—*Joint family estate—Separation—Onus Probandi.*] The *onus* is on a Hindu Plaintiff who alleges a separation in estate to prove it. The presumption is in favour of the continuance of joint estate. PRIT KOER *v.* MAHADEO PERSHAD SINGH - - - - - - 134

HOLDER OF SHARES: *See* CONSTRUCTION. 2.

INTEREST ON ARREARS OF RENT: *See* RES JUDICATA.

JOINT FAMILY ESTATE: *See* HINDU LAW.

JURISDICTION—*Letters Patent*, 1865, s. 12—"*Carry on Business*"—*Priest—Offerings of Devotees.*] The expression in the 12th section of the *Letters Patent* of 1865, "carry on business," relates to business of a kind in which actionable debts may be contracted:—*Held*, that the high priest of a shrine, who temporarily visited *Bombay*, and whilst there received offerings from its devotees either personally or through his agents, did not carry on business within the meaning of the above section, and was not liable on that ground to the jurisdiction of the High Court. GOSWAMI SHRI 108 SHRI GIRDHARIJI SHRI GOVINDRAIJI MAHARAJ *v.* SHRI GOVERDHANLALJI GIRDHARIJI MAHARAJ - 13

JURISDICTION OF FOREIGN COURT—*Decree of Foreign Court against absent Foreigner—Personal Actions.*] No territorial legislation can give jurisdiction which any foreign Court ought to recognise against absent foreigners who owe no allegiance or obedience to the Power which so legislates.—In all personal actions the Courts of the country in which the Defendant resides, not the Courts of the country where the cause of action arose, should be resorted to.—Where a *Faridkote* Court passed *ex parte* money decrees against the Defendant, who had been treasurer of *Faridkote*, but at the date of suit had ceased to be such, and was resident in *Jhind*, of which State he was a domiciled subject:—*Held*, that such decrees were a nullity by international law. —*Becquet* v. *Macarthy* (2 B. & Ad. 951) distinguished.—*Schibsby* v. *Westenholz* (Law Rep. 6 Q. B. 161) explained. SURDAR GURDYAL SINGH *v.* RAJAH OF FARIDKOTE - - - 171

JURISDICTION OF HIGH COURT IN REVIEW: *See* PROCEDURE.

LAW OF PRE-EMPTION—*Oudh Laws Act*, 1876—*Claims by Adverse Title and by Pre-emption inconsistent—Account of Mesne Profits—Co-sharer not*

LAW OF PRE-EMPTION—*continued.*

Liable to share Costs of successful Litigation, unauthorized by him.] In a suit to recover from a co-sharer possession of the Plaintiff's moiety of certain immoveable property with mesne profits from the date of suit, it appeared that the Plaintiff had sold a half-share of her moiety to her co-Plaintiffs, the price being the amount of costs to be incurred and of her maintenance, while the Defendant relied on a prior conveyance to himself of the whole moiety which was concurrently found not to have been executed:—*Held*, that the Defendant could not, as an alternative defence, claim to pre-empt the share sold to the co-Plaintiffs. His position was inconsistent with a claim by pre-emption, and in its essence the transaction with the co-Plaintiffs was the sale of a share in a lawsuit against himself:—*Held*, further, that the Plaintiff was not entitled to a decree for mesne profits before suit, but that the Defendant could not obtain an account of disbursements made by him on behalf of the estate unless he offered at the same time to account for his receipts:—*Held*, further, that the Defendant, having successfully prosecuted an appeal to the Privy Council involving title to a considerable part of the estate, a moiety of which was in suit, was not entitled, either in equity or on the ground of implied contract, to charge the Plaintiff with a moiety of the costs incurred. The proceedings were taken for his own benefit, and without authority, express or implied, from the Plaintiff. ABDUL WAHID KHAN *v.* SHALUKA BIBI - - - 26

LESSOR AND LESSEE—*Apportionment of Rent—Decree for possession of Portion of leased lands.*] Where the Appellant had obtained a decree for possession as lessee of certain portions of land comprised in her lease, the question as to amount of her liability for rent in respect thereof not having been raised in the suit or decided:—*Held*, in subsequent suits, that the Appellant, having failed to obtain a decree for possession of the remainder of the land under lease, had the same equity to an apportionment of rent as if she had been evicted therefrom. There was no ground for holding that the leases were of a speculative character, or that the Appellant contracted with knowledge that her lessor's title was disputed. IMAMBANDI BEGUM *v.* KAMLESWARI PERSHAD [118

LETTERS PATENT, 1865, s. 12: *See* JURISDICTION.

MAHOMEDAN LAW—*Marriage with Unbeliever—Presumption—Acknowledgment of Legitimacy.*] Case in which it was held upon the evidence that an alleged marriage between a Mahomedan and a Buddhist woman was disproved.—*Quære*, whether Buddhists come under the same category as Jews and Christians, with whom Mahomedans may intermarry.—*Semble*, in all cases where, according to Mahomedan law, unbelief or difference of creed is a bar to marriage with a true believer, such marriage will be valid if the alien in religion embraces the Mahomedan faith. Profession of such faith, whether with or without conversion, is necessary and sufficient to remove the disability.

MAHOMEDAN LAW—*continued.*

—The presumption which ought to be made in favour of marriage, where there has been a lengthened cohabitation, is rebutted by shewing that the conduct of the parties is inconsistent with the relation of husband and wife.—The Mahomedan doctrine of legitimacy by acknowledgment does not apply to every case of admission of paternity; an intention to confer the *status* of legitimacy must be proved or presumed.—*Ashrufood Dowlah Ahmed Hossein Khan* v. *Hyder Hossein Khan* (11 Moore's Ind. Ap. Ca. 113) followed. ABDOOL RAZACK *v.* AGA MAHOMED JAFFER BINDANEEM - - - - 56

MARRIAGE WITH UNBELIEVER: *See* MAHOMEDAN LAW.

MELKOIMA RIGHTS: *See* RIGHTS OF MANAGEMENT OF A TEMPLE.

MEMBERSHIP OF SECT OF NIHANGS; *See* EVIDENCE.

NOMINATION: *See* CONSTRUCTION OF DECREE.

OFFERINGS OF DEVOTEES: *See* JURISDICTION.

ONUS PROBANDI:
See GIFT BY HINDU WIDOW.
HINDU LAW.
PROCEDURE.

OUDH ESTATES ACT, s. 22, sub-s. 4—*Talookdar's daughter's son treated in all respects as a son—Special leave to revive an appeal.*] *Held*, that the question whether a talookdar's daughter's son has been treated in all respects as his own within the meaning of sect. 22, sub-sect. 4, of *Oudh Estates Act*, 1869, is one of fact to be tried and determined by the same method as other questions of fact; and no test for such a question can be laid down in terms less wide than those of the Act.—*Pertab Narain Singh* v. *Subhao Kooer* (Law Rep. 4 Ind. Ap. 228) considered.—Where by consent special leave was given that an appeal by a person in the line of succession prescribed by the Act should be revived by a more remote claimant thereunder, such revived appeal was held to be limited to the claim governed by the Act. UMRAO BEGAM *v.* IRSHAD HUSAIN - 163

OUDH LAWS ACT: *See* LAW OF PRE-EMPTION.

PENSIONS ACT, 1871: *See* GIFT BY HINDU WIDOW.

PERSONAL ACTIONS: *See* JURISDICTION OF FOREIGN COURT.

PRACTICE—*Unnecessary length of Records—Construction of Deeds—Release of Future and Contingent Interests.*] Where under a will three brothers took the residuary estate in equal shares, and the eldest, on the death of one without issue, sued to recover a moiety of his third share under a gift over:—*Held*, that on the true construction of certain deeds of compromise and partition between the brothers, that even if the Plaintiff were entitled under the gift over as claimed, every interest which he had or could claim thereunder had passed by the deeds. Their Lordships censured the unnecessary length of

PRACTICE—*continued.*
the record which in this case was filled with irrelevant matter. GREENDER CHUNDER GHOSE *v.* TROYLOCKHONAUTH GHOSE - - - 35

PRESUMPTION: *See* MAHOMEDAN LAW.

PRIEST: *See* JURISDICTION.

PROCEDURE—*Civil Procedure Code, s.* 584—*Jurisdiction of High Court in Review—Boundary Line of Waste Lands—Onus Probandi.*] Where a disputed line of division runs between waste lands which have not been the subject of definite possession, the ordinary rule regarding the onus upon a Plaintiff seeking demarcation does not apply. The duty is on the Defendant as much as on the Plaintiff to aid the Court in ascertaining the true boundary. Where the first Court had adopted as correct a boundary line ascertained by an amin using his own compass, and the judge affirmed such finding of fact after having remitted the case to the amin, who on the remit using a different compass returned an entirely different boundary line:—*Held*, that the High Court had no jurisdiction under sect. 584, Civil Procedure Code, to review this finding. Disregard of the amin's second report was not a substantial error or defect of procedure within that section, and no error in law was shewn. LUKHI NARAIN JAGADEB *v.* MAHARAJA JODU NATH DEO - - - - - - 39

RELEASE OF FUTURE AND CONTINGENT INTERESTS: *See* PRACTICE.

RES JUDICATA—*Bengal Tenancy Act*, 1885, *s.* 67—*Interest on Arrears of Rent—Act XIV. of* 1882, *s.* 260.] Where in 1805 the Sudder Dewani Adawlut recommended that the Respondent's talook should be separated from the Appellant's zemindary, and held at a fixed rent, and the parties thenceforth treated that recommendation as binding:—*Held*, in enhancement suits brought in 1882, that the title of the Respondent was *res judicata*, and that the rent could not be enhanced. Interest on arrears of rent is to be calculated monthly if the rent is payable monthly. Sect. 67 of the *Bengal Tenancy Act*, 1885, only applies to rent payable quarterly. RANI HEMANTA KUMARI DEBI *v.* MAHARAJAH JAGADINDRA NATH ROY BAHADUR - - - - - - 131

RIGHTS OF MANAGEMENT OF A TEMPLE—*Melkoima Rights—Effect of Compromise.*] Where the Respondents were entitled to certain Melkoima rights—*i.e.*, certain sovereign rights of superintending a temple—but in 1845 and 1874 entered into agreements of compromise with the Appellants, the Urallers or managers of the temple:—*Held*, that the usage existing thereunder for so long a period was the best exponent of the Melkoima right, and such compromise could not be reopened on any theory as to the extent of that right. CHERUKUNNETH MANAKEL NEELAKANDHEN NAMBOODIRIPAD *v.* VENGUNAT SWAROOPATHIL P. R. VARMA VALIA NAMBIDI - 128

SALE OR MORTGAGE: *See* CONSTRUCTION.

SEPARATION: *See* HINDU LAW.

SPECIAL LEAVE TO APPEAL: *See* STAY OF EXECUTION.

SPECIAL LEAVE TO REVIVE AN APPEAL: *See* OUDH ESTATES ACT.

STAY OF EXECUTION—*Special leave to Appeal.*] Their Lordships granted stay of execution of a decree of the High Court where an order to that effect had been refused, the Judges differing in opinion. CHUTRAPUT SINGH DOORGA *v.* DWARKANATH GHOSE - - - - 170

SUCCESSION: *See* EVIDENCE. 2.

SUCCESSION TO THE HEADSHIP OF A MUTT: *See* CONSTRUCTION OF DECREE.

SUIT TO RECOVER MALIKANA: *See* GIFT BY HINDU WIDOW.

SUIT TO SET ASIDE SUNNUD: *See* SUNNUD OF SHIVAGANGA.

SUNNUD OF SHIVAGANGA—*Suit to set aside Sunnud—Fraud.*] Where the Appellant claimed, in 1886, that a sunnud which, in 1803, appointed the zemindar of *Shivaganga* had been obtained from the Government by the fraud of the grantee, who, with his descendants, had thenceforth enjoyed the estate to the knowledge of the Appellant's predecessors:—*Held*, that no suit would lie after the lapse of so long a period. BALA GOURI VALLABHA TEVAR *v.* ZEMINDAR OF SHIVAGANGA - - - - - 93

TALOOKDAR'S DAUGHTER'S SON TREATED IN ALL RESPECTS AS A SON: *See* OUDH ESTATES ACT.

TERMS OF ALLOTMENT: *See* CONSTRUCTION. 2.

UNNECESSARY LENGTH OF RECORDS: *See* PRACTICE.

VENDOR AND PURCHASER—*Construction—Assignment of Mortgage as per Conditions set forth in the Bond—Compound Interest.*] Where a second mortgagee claimed to redeem against the assignee of a first mortgage, who had bought under a decree against the mortgagors for principal and interest "as per conditions set forth in the bond":—*Held*, that the assignee was entitled to compound interest, such being one of the conditions of the bond, and could not be limited to simple interest unless it clearly appeared that the decree intended to alter the terms of the bond. GUNGA PERSHAD SAHUA *v.* THE LAND MORTGAGE BANK OF INDIA, LIMITED - 1

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